JAMES P. BROWNING, JR.

No. 476

SUPREME COURT OF THE UNITED STATES

W. A. MONGRELL, JR. and JOE E. KEADZUBA,
Petitioners,

v.

PASCHAL PETROLEUM COMPANY,
A Delaware Corporation, *Respondent*.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

ESTHER BOWDOIN
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Petitioners

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Fort Worth Brief Printing Co., [illegible] Fort Worth, Texas

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No:

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1960

W. A. MONCRIEF, JR. and JOE J. KLABZUBA,
Petitioners

v.

PASOTEX PETROLEUM COMPANY,
A Delaware Corporation, *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

TO THE HONORABLE THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioners pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit entered in the above cause on May 17, 1960.

I

OPINIONS BELOW

The District Court for the Eastern District of Oklahoma did not write an opinion. The Findings of Fact, Conclusions of Law, and the Decree of that

Court is set forth in the record to the Court below (RCA 29-39).[1] The opinion of the Court of Appeals for the Tenth Circuit is unreported and is printed in Appendix "A", *infra*, page 23.

II.

JURISDICTION

The judgment of the Court of Appeals for the Tenth Circuit was made and entered on May 17, 1960 (R. 10). Petition for Rehearing on Jurisdictional grounds was denied on August 11, 1960 (R. 39). Second Petition for Rehearing was denied on August 30, 1960 (R. 81). Motion to Stay the Mandate of the Court of Appeals was granted effective September 9, 1960, for a period of thirty days, provided that if this Petition was filed within the period of the Stay, such Stay would continue until final disposition by the Court. The jurisdiction of the Court is invoked under 28 U.S.C., Section 1254(1).

III.

QUESTIONS PRESENTED

This case involves the construction of a Departmental Oil and Gas Lease covering restricted Indian

[1] "RCA" is used to designate the record on appeal to the Court of Appeals and "R" is used to designate the record on Petition for Certiorari to this Court. The former was incorporated by reference into the record certified to this court (R. 1).

Nine printed copies of the Record to the Court of Appeals are enclosed with the Petition for Certiorari to this Court. To prevent the appendix hereto, infra pages 23-41 from becoming unduly long, we have not reproduced anything which appears in the record on appeal to the Court below.

lands. It was approved by the Secretary of Interior for a primary term of ten (10) years and was issued in accordance with rules and regulations of the Department of Interior. It is undisputed that Respondent (the lessee therein) did not have a completed well, capable of producing oil or gas in paying quantities, at the expiration of the primary term of the lease although it had commenced drilling operations on such well. The dispositive, substantive issue presented is whether such Departmental lease requires the completion of a well capable of producing oil or gas in paying quantities in order to extend the primary term, or alternatively, whether such primary term is automatically extended by the mere commencement of drilling operations. Using language commonly understood in the oil industry, the question is simply whether or not the Departmental lease is a "completion" or "commencement" type oil and gas lease.

The Court of Appeals retained jurisdiction of the case on the basis of the existence of a *Federal question*, but decided that question on the basis of *State law*. Thus, the following questions are presented:

> (1) Is the construction of a Departmental Oil and Gas Lease a question "arising under the Constitution, laws and treaties of the United States?"
>
> (2) If that question is answered in the affirmative, then is the Federal Court bound to construe the lease by applying only the law of the State where the Court is sitting (as held below) or may the Court apply Federal law?
>
> (3) If such a lease is to be construed under

Federal law, does it expire in the absence of production at the end of the primary term even though drilling operations have been commenced?

The final two questions presented concern administrative procedure and may be stated as follows:

(4) Has the Congress delegated to the Secretary of Interior jurisdictional power to determine whether a Departmental Oil and Gas Lease has expired by its own terms?

(5) If the preceding question is answered in the affirmative, then must the administrative remedy before the Secretary be exhausted before resort is had to a United States District Court?

Upon the determination of these questions depends the rights and obligations of the United States, restricted Indians who are Wards of the United States, and Lessees under hundreds of Departmental Oil and Gas Leases covering thousands of acres of land located in many states.

IV.

STATUTES INVOLVED

Every provision of the Departmental lease (RCA 9-19) is governed by Federal regulations. The leasing of restricted Indian lands of members of the Five Civilized Tribes is governed by regulations set forth in 25 C.F.R., Part 174. Pertinent sections of the regulations are quoted in Appendix "B" hereto, *infra*, pages 28-30. Statutory authority for such regulations is contained in Section 2, 35 Stat. 312, Section 18, 41

Stat. 426, Section 1, 45 Stat. 495, Section 1, 45 Stat. 777, Sections 16-17, 48 Stat. 987, 988, Section 9, 49 Stat. 1968, Section 4, 52 Stat. 348; 25 U.S.C. 68, 356, 396d, 476, 477, 599.

Other statutory provisions involved are 28 U.S.C., Section 1331(a) and Section 3 of the Act of April 12, 1926, 44 Stat. 239, as amended, by Section 3(c) of the Act of August 4, 1947, 61 Stat. 732, the same being set out in Appendix "B", *infra*, pages 30-33.

Reference is also made in this Petition to certain sections of 30 C.F.R., Part 221, entitled "*Operating regulations*" governing the development of lands for oil and gas under the supervision of the Department of Interior which are set out in Appendix "B" hereto, *infra*, pages 33-35.

V.

STATEMENT

The essential facts in this case are undisputed. Rosa McCann, a Full-Blood Indian allottee, executed a departmental type oil and gas lease in favor of The California Company on May 13, 1948 (RCA 9). This lease covered 96.55 acres of land in Love County, Oklahoma, including the 32.18 acres in controversy. The Secretary of the Interior approved this lease on the *10th day of June, 1948*[1] (RCA 18), and the term clause of such lease provided in part as follows:

> "Lessor, * * * does hereby grant and lease to the lessee the exclusive right and privilege to drill for, mine, extract, remove and dispose of all of

[1] Emphasis supplied throughout.

> the oil and natural gas deposits in or under the following described tracts of land * * * *for the term of ten years from and after the approval hereof by the Secretary of the Interior and as much longer thereafter as oil and or gas is produced in paying quantities from said land.*" (Par. 1, RCA 10; 25 C.F.R. 174.5, *infra*, pages 28-29.)

One of Rosa McCann's children, Mary Bell Cooper, now Chadwick, a Half-Blood Indian, inherited an undivided one-third interest in said lands, or a total of 32.18 acres.

The Rosa McCann lease was subsequently assigned by The California Company to Respondent. In March of 1958, Respondent, pursuant to action before the Corporation Commission of Oklahoma, caused the 32.18 acres in dispute to be pooled with other lands to form two drilling and spacing units. With respect to one of these units, Respondent included therein another tract upon which it had previously commenced the drilling of a well (RCA 75). It was the drilling operations on this well (referred to herein as the Brannan well) that Respondent claims extended the primary term of the Departmental lease insofar as it covers the 32.18 acres (RCA 7).

In May of 1958, approximately one month before the primary term of the Departmental lease expired, Respondent (Pasotex) requested the Department of Interior to advertise the 32.18 acres for competitive lease bidding. The Department permitted the same to be advertised and served notice that bidding would take place in the County Court of Love County, Okla-

homa. In open Court and at public auction on the 27th day of May, 1958, one of the Petitioners, Joe J. Klabzuba, and the Respondent engaged in competitive bidding for a new oil and gas lease on the 32.18 acres. The Petitioner, Klabzuba, having made the highest bid ($6,600), obtained a lease on the disuted acreage for a term of five (5) years from *June 10, 1958*, such lease having been subsequently assigned in part to W. A. Moncrief, Jr., Fort Worth, Texas. The new lease was sold through the County Court of Love County, Oklahoma. (RCA 4)

Thereafter, *on June 10, 1958*, the Haliburton Oil Well Cementing Company conducted a drill stem test on the Brannan Well. During a one and one-half hour test period, there was brought to the surface and measured by an Orifice Meter placed in the gas vent line 23.1 M.C.F. of gas and 2.1 barrels of condensate. Both the gas and condensate brought to the surface as a result of this drill stem test were burned, and no attempt was made to market, save or otherwise reduce such hydrocarbons to possession (RCA 29; 61).

An electric log was run on the well on June 12, 1958, (RCA 28). Casing was run in the well on June 14, 1958. Tubing was run in the well on June 15, 1958, and the casing was first perforated into the Basal Oil Creek Sand on June 18, 1958. The last perforations of the casing into the Basal Oil Creek Sand were made on June 19, 1958 (RCA 27). A Christmas tree was installed on the well on June 21, 1958. At the time of the trial, no separation equipment or tankage had been installed on the lease (RCA 28).

The first oil or gas ever brought to the surface in the Brannan well through *its permanent producing equipment occurred on June 21, 1958*, for the purpose of conducting open flow potential tests. The gas produced through the permanent production equipment as a result of the open flow tests was flared, but the condensate produced in connection therewith was sold and marketed on July 6, 1958 (RCA 28).

Petitioners notified Respondent of their claim to the 32.18 acres and offered to pay their proportionate part (approximately 7%) of the total costs of drilling and completing the Brannan well. This offer was refused.

On August 18, 1958, Petitioners filed this suit in the United States District Court for the Eastern District of Oklahoma for the purpose of quieting title as against Respondent's Departmental lease insofar as it covered the 32.18 acres here in dispute (RCA 1). Respondent, after having made the Half-Blood Indian heir a party defendant to the suit and after having served notice of the pendency of the suit on the Department of Interior, filed its Answer and counterclaim against the Petitioners and the Indian alleging the validity of its own lease. (RCA 3-9) The original theory of Federal jurisdiction was that of diversity of citizenship (RCA 53-55). When it was determined that there was no diversity between Petitioner Moncrief and Respondent[1], Petitioners offered to dismiss (RCA 54). The Respondent resisted this dismissal on the ground that jurisdiction existed because of a Fed-

[1]Under the recent amendment to 28 U.S.C., Section 1332 the corporate defendant (Pasotex) was deemed to be a citizen of both Delaware and Texas and Moncrief is a citizen of Texas.

eral question. The Department of Interior refused to participate in the suit because, in its judgment, the interest of the Indian is "not in jeopardy" (RCA 71).

On July 30, 1959, the District Court rendered its findings and conclusions validating the Departmental lease and declared Petitioners' lease to be null and void. On May 17, 1960, the Court of Appeals affirmed the Judgment of the District Court, using as authority for its decision, the *substantive law of* Oklahoma, but retained jurisdiction of the case on the basis of the existence of a Federal question. Petitioners thereupon timely filed their First Petition for Rehearing which urged the lack of Federal jurisdiction to decide the case. (R. 11-21).

On June 28, 1960, the Court of Appeals directed the Respondent to file a response to this Petition for Rehearing (R. 22-30) and thereafter on August 11, 1960, the Court denied the Petition without opinion (R. 39), but permitted the Petitioners to file a Second Petition for Rehearing. Such Second Petition for Rehearing was thereupon filed urging that federal law should be applied in construing the Departmental lease (R. 40-80). It was denied by the Court on August 20, 1960, also without opinion (R. 81).

VI.

REASONS FOR GRANTING THE WRIT

1. This Court has repeatedly held that the existence of a Federal question which will vest jurisdiction in a United States District Court must be disclosed

by the complaint unaided by the defendant's answer or affirmative defenses. *Metcalf v. Watertown*, 128 U.S. 586, 589; 32 L.Ed. 543, 544; *Gully v. First National Bank*, 299 U.S. 109, 114, 81 L.Ed. 70, 72; *Skelly Oil Company v. Phillips Petroleum Company*, 339 U.S. 667, 672, 673; 94 L.Ed. 1194, 1200.

The complaint filed by the Petitioners in this case did not raise a Federal question (RCA 1). The District Court so concluded (RCA 34). Jurisdiction was retained in the Federal Court only as a result of a *counterclaim* (RCA 5; 54) filed by the Respondent which did nothing more than to assert the superiority of its own leasehold title. Allegations therein which merely show that the claim asserted has its *origin* in the laws of the United States are insufficient to raise a Federal question. Such allegations must clearly reflect a genuine controversy involving the validity, construction or effect of Federal law. *Shulthis v. McDougal*, 225 U.S. 561, 56 L.Ed. 1025; *Earnett v. Kuykel*, 264 U.S. 16, 68 L.Ed. 539. *Since there is no jurisdictional basis asserted in the counterclaim independent of that contained in the complaint*, the counterclaim could not survive. *Kelleam, et al v. Maryland Casualty*, 312 U.S. 377, 382; 85 L.Ed. 899, 903. Moreover, this Court in recent opinions has shown an increasing reluctance to expand Federal question jurisdiction through a broad reading of 28 U.S.C. 1331. *Romero v. International Terminal Operating Company*, 358 U.S. 354; 3 L.Ed. 2d 368; *Skelly Oil Company v. Phillips Petroleum Company*, *supra*.

In the absence of a Federal statute creating juris-

diction in the Federal court, the mere presence of an Indian as a party to the suit does not vest Federal jurisdiction. *Martinez v. Southern Ute Tribe of Southern Ute Reservation*, 249 F.2d 915, cert. denied, 356 U.S. 960, 2 L.Ed. 2d 1067. See also, *Martinez v. Southern Ute Tribe*, 273 F.2d 731. The Respondent however, in an effort to bolster its jurisdictional argument, contended that Section 3 of an Act of Congress dated April 12, 1926, 44 Stat. 239 *infra*, pages 30-32) conferred *original* jurisdiction in the Federal Court. This statute, according to its plain and unambiguous language, relates only to the *removal* of certain cases. Sometimes, where a member of the Five Civilized Tribes is a party to a lawsuit, the statute permits the United States to remove a case from a State Court to a Federal District Court. *Davis v. Jones*, 254 F.2d 696, 698, cert. denied, 358 U.S. 865, 2 L.Ed. 2d 98. It has nothing to do with original jurisdiction and defeats State jurisdiction only when the United States, *acting in the interest of the Indian*, elects to remove the case. *U.S. v. Kennamer*, 37 F.2d 243, 246. Furthermore, the 1947 amendment to the Act, *infra*, page 33, makes it absolutely certain that the right of removal is exclusive to the Government:

> "No action . . . shall be removed to a United States district court except upon the recommendation of the Secretary of the Interior or his duly authorized representative."

2. The lower Courts' determination that Federal jurisdiction exists in this case is predicated solely on the existence of a Federal question arising "under the

Constitution, laws and treaties of the United States." Yet, with obvious inconsistency, the opinion of the Court of Appeals makes it quite clear that it has decided the dispositive issue in this case purely by the substantive law of Oklahoma. *infra*, page 26. On this point the Court of Appeals declared:

> "To explore the soundness of the premise, [that the departmental lease required the completion of a commercial well during the primary term] the drilling and production requirements of the lease must be examined *in the light of Oklahoma* law as it has been pronounced."

Where diversity of citizenship is lacking, it is fundamental that a Federal Court is *not* required to follow the substantive law of the State where it is sitting in resolving questions arising under the Constitution, laws and treaties of the United States. *Erie Railroad Company v. Tompkins*, 304 U.S. 64, 82 L.Ed. 1188. Without exception, this Court has concluded that such cases should be resolved in accordance with Federal law. *Jackson County v. United States*, 308 U.S. 343, 349, 350; 84 L.Ed. 313, 316; *Deitrick v. Greaney*, 309 U.S. 190, 200, 201; 84 L.Ed. 694, 701; *D'Oench D. & Co. v. Fed. Deposit Insurance Corp.*, 315 U.S. 447, 455, 456; 86 L.Ed. 956, 961.

The Departmental lease is nothing more than a restatement of the rules and regulations issued by the Department of Interior pursuant to Acts of Congress covering the leasing of restricted Indian lands. *infra*, pages 28-30. Each of such regulations has the same force and effect as a Federal statute. *Seber v. Spring*

Oil Company, 33 F.Supp. 805; 808 (N.D. Okla. 1940); *Cuba v. United States*, 152 U.S. 211, 38 L.Ed. 415. To sustain Federal jurisdiction, the Court of Appeals concluded that the question to be determined involved the construction of Federal law. If the case can be determined *without deciding a Federal question*, Petitioners say that there simply is no Federal jurisdiction. If the case *can be determined only by construing Federal law*, we then say *it should be decided in accordance with Federal law*.

For that matter, the regulations make it perfectly clear that the Secretary of Interior, when construing a Departmental lease, is *not* confined to the application of State law:

> "In the exercise of his judgment the Secretary of the Interior may take into consideration, among other things, the Federal laws, State laws, regulations by competent Federal or State authority, lawful agreements among operators regulating either drilling or production or both." 25 C.F.R. 174.31, *infra*, page 29.

3. The decision of the Court below, using as it does the substantive law of Oklahoma in construing the Departmental lease, is in probable conflict with the decision of this Court in *Sperry Oil and Gas Co. v. Chisholm*, 264 U.S. 488, 68 L.Ed. 803. In the *Sperry* case, this Court unequivocally declared that the laws of Oklahoma must give way to Federal law in the construction of oil and gas leases covering restricted Indian lands:

> "Neither the constitution of a State nor any act of its legislature, whatever rights it may confer

> on Indians or withhold from them, can withdraw them from the operation of an act which Congress passes concerning them in the exercise of its paramount authority." 264 U.S. 497; 68 L.Ed. 810.

4. The impact of the lower Court's opinion will extend far beyond Petitioners' particular interest because there are now hundreds of existing oil and gas leases, not only in Oklahoma, but in other states as well, covering thousands of acres of land held under the same, or substantially the same, Departmental form here involved. Not only are restricted Indian lands covered by this form of lease, but United States public lands as well, including the "acquired lands" which are now subject to lease by the Department of Interior. (43 C.F.R., Part 192, 1959 Poc. Supp.) It is important in the administration of Departmental Oil and Gas Leases and plainly in the public interest, to have some degree of uniformity in the construction of such leases. As a result of the lower Court's decision, there can be no uniformity of construction between United States District Courts, even those under the jurisdiction of the 10th Circuit, because a District Court will be constrained to construe the lease in accordance with the substantive law of the particular State where the Court is sitting. To illustrate, since the Departmental lease was construed in accordance with what the Court of Appeals considered to be the Oklahoma law, the Court would necessarily apply Kansas law if this identical lease were brought on an appeal from a United States District Court sitting in Kansas. If so, the construction of the Departmental

lease would be just the opposite. *Home Royalty, Inc. v. Stone*, et al, 199 F.2d 650 (10th Cir. 1952). Likewise, a different conclusion would have resulted if the case had been appealed from a United States District Court sitting in New Mexico[1], Montana[2], Ohio[3] or Texas[4].

5. The opinion of the Court of Appeals is directly in conflict with the findings and decisions of the Department of Interior in construing Departmental Oil and Gas Leases covering restricted Indian lands. The Department has uniformly construed such leases to be "completion leases" that required production in paying quantities prior to the expiration of the primary term of the lease. See Opinion of the Assistant Secretary, *Oil and Gas Leases on Allotted Indian Lands*, dated July 2, 1942, 58 I.D. 12. See also, the Opinion of the Assistant Secretary in the case of The Superior Oil Company and The British-American Oil Producing Company, IA-697, March 8, 1957, 64 I.D.49 and printed in Appendix "C" hereto, *infra*, pages 36-41.

The Secretary has consistently reached the same conclusion in construing Federal Oil and Gas Leases covering public lands. *James Shelton*, 62 I.D. 236; *H. K. Riddle*, 62 I.D. 82; Martin Oil Company, 63 I.D. 392; United Manufacturing Company, 65 I. D. 106; See also Solicitors Opinion, *Oil and Gas Leases*, 60 I.D. 261.

The Court of Appeals correctly points out in its opinion that the Departmental lease does not contain

[1] *Tonic Land Grant v. Ringle Development Co.*, 240 P. 2d 850 (1952).
[2] *Berthelote v. Loy Oil Co.*, 28 P. 2d 187 (1934).
[3] *Murdock West Co. v. Logan*, 69 N.E. 984 (1904).
[4] *Holchak v. Clark*, 284 S.W. 2d 209 (1955).

a delay rental, well completion or continuous drilling clause, "so as to clearly indicate the intention of the parties to contract conditionally beyond the primary term", *infra*, page 26. After having made this determination, we submit that the Court should then *have scrutinized the term clause* in order to ascertain what was required to extend the lease beyond the primary term of ten years. In other words, since the Court apparently found that there was no provision in the lease which modified the term clause, such clause standing alone and unaided fixed the duration of the Departmental lease. According to its express provisions, only production "in paying quantities" could operate to extend the term clause (to which we might add, parenthetically, could result only from a completed well, physically capable of producing oil or gas). We respectfully submit the overwhelming weight of authority in this country, both State and Federal cases, sustains us in this premise. *Summers, Oil & Gas*, Vol. 2, Sections 293 and 300 (Perm. Ed. 1959). In a footnote to its opinion, the Court of Appeals concedes *that Oklahoma law is in conflict with the law of other jurisdictions on this point; infra*, page 27. With the exception noted below, however, the most recent pronouncement by the Oklahoma Supreme Court actually is *in accord* with the majority view. *State v. Carter Oil Company of West Virginia*, 336 Pac.2d 1086.

The only deviation that the Oklahoma Courts have made from this general rule is that when the lease contains a delay rental clause, such clause has been construed with the term clause to permit the comple-

tion of a well commenced during the primary term. *Simms v. McDaniel*, 7 Pac.2d 419. The Oklahoma Courts have reasoned that since the lessee paid for the right to delay the commencement of a well, the lessee should have what was "reasonably necessary to the enjoyment of the thing granted" *by the lease*, namely, the right to complete the well. The Departmental lease contains *no delay rental clause. Neither does it contain a commencement or continuous drilling clause* which would permit the Respondent to complete the well after the primary term had expired. Nevertheless, the Court of Appeals paid no attention to this distinction so carefully made in Oklahoma cases such as *State v. Carter Oil Company*, *supra*, and seized upon an offset well clause in the Departmental lease and construed it to have *the same legal effect* as a delay rental or continuous drilling clause. The offset well clause (25 C.F.R. 174.32, *infra*, pages 29-30) is designed to protect the leased land from drainage and of course, does not become operative except to protect against drainage. The construction placed upon the offset well clause by the Court of Appeals did nothing more than work an equitable extension of the lease, contrary and in disregard of the plain language of the lease agreement.

6. The Federal Rules of Practice governing oil and gas leases on public lands are set forth in 43 C.F.R., Part 221, (1959, Poc.Supp.). Initial jurisdiction to determine all contests or protests involving such leases is vested in the Secretary of Interior. 43 C.F.R., Sections 221.51 and 221.53. It has been held that the pro-

cedures for relief provided for in these rules must be exhausted before resort may be had to the Court:

> "It is not possible for the Court at this time to determine that either plaintiff or defendants do not have any interest in the property in question. This matter should be ascertained by the Bureau of Land Management under the administrative procedures as set forth in the Act. Until administrative remedies have been exhausted, neither plaintiff nor defendant have any right to ask this court to solve the problem. As a consequence, this action will be ordered dismissed." *Call v. Richfield Oil Corp.*, 101 F.Supp. 972, 975 (S.D. Cal. 1951).

The language of the regulations governing the leasing of restricted lands of members of the Five Civilized Tribes strongly indicates that Congress likewise intends for the Secretary to *initially* pass upon questions arising out of oil and gas leases issued pursuant to such regulations. For example, the Secretary is empowered to impose penalties and cancellations where lease violations occur:

> "*Penalties. Failure of the lessee to comply with any provisions of the lease, of the operating regulations, of the regulations in this part, orders of the Area Director or his representative, or the orders of the supervisor or his representative,* shall subject the lease to cancellation by the Secretary of the Interior or the lessee to a penalty of not more than $500 per day for each day the terms of the lease, the regulations, or such orders are violated, or to both such penalty and cancellation: *Provided*, That the lessee shall be entitled to notice and hearing, within 30 days after such

notice, with respect to the terms of the lease, regulations, or orders violated, which hearing shall be held by the supervisor, *whose findings shall be conclusive unless an appeal be taken to the Secretary of the Interior within 20 days after notice of the supervisor's decision, and the decision of the Secretary of the Interior upon appeal shall be conclusive.*" 25 C.F.R. 174.37.

"*Cancellations.* (a) *When, in the opinion of the Secretary of the Interior, the lessee has violated any of the terms and conditions of a lease or of the applicable regulations,* or if mining operations are conducted wastefully and without regard to good mining practice, *the Secretary of the Interior shall have the right at any time after 30 days' notice to the lessee specifying the terms and conditions violated, and after a hearing, if the lessee shall so request within 30 days after issuance of the notice, to declare such lease null and void,* and the lessor shall then be entitled and authorized to take immediate possession of the land." 25 C.F.R. 174.40.

"*Oil and Gas Operating Regulations*" governing the development of lands under Departmental supervision, *including restricted Indian lands*, are contained in 30 C.F.R., Part 221. Pertinent sections of these regulations are set out in Appendix "B" hereto, *infra*, pages 33-35. Section 221.3, (*infra*, pages 33-34), entitled "Jurisdiction" provides in part that:

". . . all [drilling and production] operations subject to the regulations in this part *are under the jurisdiction of the supervisor for any district as delineated* by the Director."

Section 221.4, *Infra*, page 310 entitled "General functions" states in part as follows:

> "§ 221.4 *General functions.* The supervisor is hereby authorized to *require compliance with lease terms, with the regulations in this part, and all other applicable regulations, and with applicable law* to the end that all operations shall conform to the best practice and shall be conducted in such manner as to protect the deposits of the leased lands and result in the maximum ultimate recovery of oil, gas, or other products with minimum waste."

The Secretary of Interior has never relinquished supervision of the Departmental lease insofar as it relates to the controverted 32.18 acres (RCA 78). Yet, he has thus far declined to make an official ruling as to whether or not such lease expired at the expiration of its primary term, merely being content to say that the rights of the Indian are not in "jeopardy" (RCA 71). The Court below has held a formal finding by the Secretary of Interior in construing a Departmental lease is binding upon the Courts in the absence of a showing that the finding was arbitrary or fraudulent. *Continental Oil Company v. Osage Refining Company*, 69 F.2d 19, 27 (10th Cir. 1934).

We submit that the Department of Interior should not be permitted to adopt a "laissez-faire" attitude with regard to matters which Congress has entrusted to its supervision. The Department should not be permitted to "switch off" its jurisdiction because it thinks an Indian Ward's rights are not "in jeopardy" and then suddenly "switch it on" again when it thinks the

economic interest of the United States is at stake. For example, if this case involved valuable lands under Departmental supervision in Alaska or in the Tidelands area (as may well happen in the future), the Secretary would be before this Court taking a more jealous attitude of his delegated authority.

Finally, we respectfully ask the Court to bear in mind that Petitioners' lease by which they assert a claim of interest to the lands involved was obtained at a judicial sale as a result of action by the Department of Interior in permitting such lease to be advertised for competitive bidding. It should be emphasized that the County Court of Love County, Oklahoma, who sold the lease to Petitioner Klabzuba, *was acting as a "federal agency" for the Department. Parker v. Richard*, 250 U.S. 235, 63 L.Ed. 954; *United States v. Gypsy Oil Company*, 10 F.2d 487, 492 (10th Cir. 1925). Such authority was conferred upon it directly by the Congress. Section 9, 61 Stat. 731. Moreover, the Department had *absolute discretion* as to whether this new lease should have been advertised for bidding. 25 C.F.R. 174.4, Appendix "B" hereto, *infra*, page 28. Petitioners proceeded to bid on the lease in good faith as a result of the actions of the Respondent and the Department, only to be told later that the proceedings in the County Court of Oklahoma were merely held for the purpose of providing insurance, albeit unnecessary, for the Respondent.

The Secretary undoubtedly has broad discretionary power in the administration of lands under his supervision, especially in the granting of oil and gas leases.

In this case, however, the Secretary first *exercised* his discretionary authority and approved an oil and gas lease to the Respondent covering lands under his supervision. Ten years later, he *again exercised* his discretion and permitted the Petitioners to purchase a new lease which included the *same* acreage previously covered by Respondent's lease. Under such circumstances, the regulations conferred upon the Secretary not only the jurisdiction, but the duty, to dispose of this controversy, and this case should be dismissed and remanded to him for that purpose.

VII.

CONCLUSION

For the foregoing reasons, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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Oklahoma City, Oklahoma
Counsel of Record for Petitioner.

Dee J. Kelly
Petroleum Building
9th & Commerce
Fort Worth, Texas

APPENDIX "A"

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

March Term, 1960

No. 6239

W. A. MONCRIEF, JR. AND
JOE J. KLABZUBA, Appellants

v.

PASOTEX PETROLEUM COMPANY,
A Delaware corporation, Appellee

Appeal from the United States District Court
for the Eastern District of Oklahoma

Dee J. Kelly, Fort Worth, Texas, and T. Murray Robinson, of Robinson, Shipp, Robertson & Barnes, Oklahoma City, Oklahoma, for Appellants.

George N. Otey, Admore, Oklahoma, (R. Rhys Evans, Ardmore, Oklahoma, and C. W. Proctor, Houston, Texas, T. N. Jordan, Jr., Coloraclo, and Otey, Johnson & Evans, Ardmore, Oklahoma, of counsel, on the brief) for Appellee.

Before BRATTON, PICKETT and LEWIS, Circuit Judges.

LEWIS, Circuit Judge.

The dispositive question presented by this appeal is whether or not, under undisputed facts, the lessee of an oil and gas lease on restricted Oklahoma Indian lands has complied with the lease requirements so as to extend the lease beyond its primary term. Appellee-defendant is the lessee under the subject lease, one approved by the Department of Interior for Rosa Drake McCann, an enrolled full-blooded Choctaw Indian. Appellants-plaintiffs assert claim to the lands through a subsequent lease executed by the daughter and heir of the original allottee.[1]

The departmental lease, dated May 13, 1948, and approved by the Secretary of the Interior on June 10, 1948, is "for a term of 10 years from and after the approval hereof by the Secretary of the Interior and as much longer thereafter as oil and or gas is produced in paying quantities from said land." By other provisions in the lease, the lessee is required to pay periodically a cash rental; is required to drill and produce all wells necessary to offset or protect the leased land from drainage, or in lieu thereof to compensate the lessor in full for the estimated loss of royalty through drainage; is required at its election to drill and produce other wells, or in the event of its election not to drill and produce such other wells, to pay in lieu thereof a sum to be fixed by the Secretary of the Interior not to exceed $1.00 per acre per annum; is required to pay a royalty of 12½ per cent of the oil or gas, or both, produced and saved from

[1] The daughter, Mrs. Chadwick, is a party to this action though not named in the caption. The named parties are each considered as original lessees through some take by assignment.

the premises; is required to abide by and conform to any and all regulations of the Secretary of the Interior relative to such lease; and is required to comply with restrictions imposed by the Secretary as to the time or times for the drilling of wells and as to the production from any well or wells drilled when in his judgment such action may be necessary or proper.

By order dated March 6, 1958, the Oklahoma Corporation Commission designated the leased lands as part of a drilling unit consisting of a total of 320 acres and this order received the requisite approval of the Secretary of the Interior upon March 31, 1958. The drilling unit included a tract upon which appellee had begun drilling in 1957 and upon which production in paying quantities was discovered on June 4, 1958. Development was continued with due diligence and the well was completed as a commercial producer at a date not later than June 21, 1958.

On June 4, 1958, penetration was made into a gas producing horizon which was confirmed on June 7, 1958, to be the first of such kind capable of producing oil and gas in paying quantities. On June 10, 1958, this test was taken and production was measured for 24 hours, showing a rate of approximately 1,300,000 cubic feet of gas per day and 30 barrels of condensate. The rate of actual production of such flow test was sufficient to pay the cost of operating the well plus a profit based upon Corporation Commission allowables.

There was no drilling on this well subsequent to June 10, 1958, condensate from the well was sold between June 21, 1958, and June 25, 1958. The well produces condensate and gas which under Oklahoma law may not be wasted. Pasotex has supplied the well pending development of a market for the gas and is now drilling additional wells to establish reserves sufficient to obtain a permanent market for the sale of the gas from the well.

The consideration of the case requires neither a determination of the production date nor the issue of whether or not June 10, 1958, was within the primary term.

Each of appellants' contentions urging reversal spring as corollaries from their basic premise that the departmental lease required the completion of a commercial well during the primary term and that commencement of such a development during the primary term did not serve to extend the lessees' rights. To explore the soundness of the premise, the drilling and production requirements of the lease must be examined in view of Oklahoma law as it has been pronounced. And Oklahoma has consistently favored such interpretation of lease rights as will favor development and permit completion of a well rightfully commenced. *Simons v. McDaniel*, 154 Okl. 168, 7 P.2d 419, 421.

The departmental lease contains no specific provision requiring completion of a commercial well during the primary term and voiding the lease absent such completion: *Cf. State v. Carter Oil Co. of West Va.*, (Okl. 1959) 336 P. 2d 1086. Nor does it have a delay rental, well completion, or continuous drilling clause so as to clearly indicate the intention of the parties to contract conditionally beyond the primary term. *Cf. Champlin Refining Co. v. Magnolia Pet. Co.*, 178 Okl. 203, 62 P. 2d 249; *Hicks v. Mid-Kansas Oil & Gas Co.*, 182 Okl. 61, 76 P. 2d 269; *Provaznt v. Sealy*, 77 Okl. 244, 187 P. 235; *McClain v. Harper* (Okl. 1952) 244 P. 2d 301. But the lease did provide the right and duty to and upon the lessee to protect the lands by drilling at any and all times during the full extent of the primary term or pay royalties in lieu thereof, a clause indicative of the primary intent of the parties to develop the properties. The right to

commence a well during the primary term carries with it, by necessary legal implication, the right to complete the well after expiration of the primary term unless negatived by contract terms or loss by abandonment. *Simons v. McDaniel*, supra. The liberal rule of the Oklahoma courts has been recently applied in defining the distinction between "commencement" and "completion" leases and in extending the rights of lessees beyond the primary term in order to give by implication every right "which is necessary to the enjoyment of the thing granted." In *State v. Carter Oil Company of West Virginia*, supra, the court contrasted two leases one of which was "for a term ending September 26, 1955, and as long thereafter as oil, gas, casinghead gasoline or any of them is produced"; the other lease provided for a "term of five years from the date hereof and as long thereafter as oil and gas or either of them is produced in paying quantities . . . provided . . . that unless a producing well in paying quantities of oil or gas is completed on the above described premises within five years from date hereon this lease shall be void." The court termed the first lease a commencement lease allowing the lessee to complete the drilling after the expiration of the primary term. The second lease was held to be a completion lease but carrying with it only the obligation of completing a well capable of producing oil and gas in paying quantities during the primary term.

The court was fully cognizant of conflicting authorities. At page 1006 the court states:

"The commissioners cite numerous cases from other jurisdictions which although enlightening expound a rule in conflict with the decisions of this court. We are in accord with the philosophy of our previous holdings which is re-announced herein."

In view of these decisions of the state court we have no doubt that the trial court correctly concluded that the departmental lease was a commencement lease and that appellee had complied with its terms allowing an extension beyond the primary term.

The judgment is affirmed.

APPENDIX "B"

LEASING OF RESTRICTED LANDS OF MEMBERS OF FIVE CIVILIZED TRIBES, OKLAHOMA, FOR MINING (25 C.F.R., Part 174)

---

§ 174.4. *Sale of oil and gas leases.* (c) All notices or advertisements of sales of oil and gas leases shall reserve to the Secretary of the Interior the right to reject all bids when in his judgment the interests of the Indians will be best served by so doing, and that if no satisfactory bid is received, or if the accepted bidder fails to complete the lease, or if the Secretary of the Interior shall determine that it is unwise in the interests of the Indians to accept the highest bid, the Secretary may readvertise such lease for sale, or if deemed advisable, with the consent of the Indian owners, a lease may be made by private negotiations. The unsuccessful bidder or bidders will be required to pay his or their share of the advertising costs. Amounts received from unsuccessful bidders will be returned; but when no bid is accepted on a tract, the costs of advertising will be assessed against the applicant who requested that said tract be advertised.".

"§ 174.5. *Term of oil and gas leases.* Oil and

gas mining leases which require the approval of the Secretary of the Interior may be made for periods of 10 years from the date of approval of lease by the Secretary of the Interior and as much longer thereafter as oil and or gas is produced in paying quantities."

"§ 174.31. *Restrictions on operations.* (a) Oil and gas leases issued under the provisions of this part shall be subject to imposition by the Secretary of the Interior of such restrictions as to time or times for the drilling of wells and as to the production from any well or wells as in his judgment may be necessary or proper for the protection of the natural resources of the leased land and in the interest of the lessor. In the exercise of his judgment the Secretary of the Interior may take into consideration, among other things, the Federal laws, State laws, regulations by competent Federal or State authorities, lawful agreements among operators regulating either drilling or production, or both.

"§ 174.32. *Wells.* The lessee shall agree (a) to drill and produce all wells necessary to offset or protect the leased land from drainage by wells on adjoining lands not the property of the lessor, or in lieu thereof, compensate the lessor in full each month for the estimated loss of royalty through drainage: Provided, That during the period of supervision by the Secretary of the Interior, the necessity for offset wells shall be determined by the supervisor and payment in lieu of drilling and producing shall be with the consent of, and in an amount determined by the Secretary of the Interior; (b) at the election of the lessee to drill and produce other wells: Provided, That the right to drill and produce such other wells

shall be subject to any system of well spacing or production allotments authorized and approved under applicable law or regulations, approved by the Secretary of the Interior and affecting the field or area in which the leased lands are situated; and (c) if the lessee elects not to drill and produce such other wells for any period the Secretary of the Interior may, within 10 days after due notice in writing, either require the drilling and production of such wells to the number necessary, in his opinion to insure reasonable diligence in the development and operation of the property, or may in lieu of such additional diligent drilling and production require the payment on and after the first anniversary date of the lease of not to exceed $1 per acre per annum, which sum shall be in addition to any rental or royalty herein specified."

28 U.S.C. Section 1331(a)

"§ 1331. *Federal question; amount in controversy; costs* (a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States." As amended July 25, 1958, Pub.L. 85-554, § 1, 72 Stat. 415.

Act of April 12, 1926

Sec. 3. Any one or more of the parties to a suit in the United States courts in the State of Oklahoma or in the State courts of Oklahoma to which a restricted member of the Five Civilized Tribes in Oklahoma, or the restricted heirs or grantees of such Indian are parties, as plaintiff, defendant, or intervenor, and

claiming or entitled to claim title to or an interest in lands allotted to a citizen of the Five Civilized Tribes or the proceeds, issues, rents, and profits derived from the same, may serve written notice of the pendency of such suit upon the Superintendent for the Five Civilized Tribes, and the United States may appear in said cause within twenty days thereafter, or within such extended time as the trial court in its discretion may permit, and after such appearance or the expiration of said twenty days or any extension thereof the proceedings and judgment in said cause shall bind the United States and the parties thereto to the same extent as though no Indian land or question were involved. Duplicate original of the notice shall be filed with the clerk of the court in which the action is pending and the notice shall be served on the Superintendent for the Five Civilized Tribes or, in case of his absence from his principal office, upon one of his assistants, and shall be served within ten days after the general appearance in the case of the party who causes the notice to be issued. The notice shall be accompanied by a certified copy of all pleadings on file in the suit at the time of the filing of the duplicate original notice with the clerk and shall be signed by the party to the action or his or her counsel of record and shall be served by the United States marshal and due return of service made thereon, showing date of receipt and service of notice. If notice is not served within the time herein specified, or if return of service thereof be not made within the time allowed by law for the return of service of summons, alias notices may be given until service and return of notice is had

and in no event shall the United States be bound unless written notice is had as herein specified: *Provided*, That within twenty days after the service of such notice on the Superintendent for the Five Civilized Tribes or within such extended time as the trial court in its discretion may permit the United States may be, and hereby is, given the right to remove any such suit pending in a State court to the United States district court by filing in such suit in the State court a petition for the removal of such suit into the said United States district court, to be held in the district where such suit is pending, together with the certified copy of the pleadings in such suit served on the Superintendent for the Five Civilized Tribes as hereinbefore provided. It shall then be the duty of the State court to accept such petition and proceed no further in said suit. The said copy shall be entered in the said district court of the United States within twenty days after the filing of the petition for removal and the defendants and intervenors in said suit shall within twenty days thereafter plead, answer, or demur to the declaration or complaint in said cause, and the cause shall then proceed in the same manner as if it had been originally commenced in said district court, and such court is hereby given jurisdiction to hear and determine said suit, and its judgment may be reviewed by certiorari, appeal, or writ of error in like manner as if the suit had been originally brought in said district court.

Approved, April 12, 1926

44 Stat. 239

Act of August 4, 1947

Sec. 3 (c). No action or proceeding in which notice has been served on the Superintendent for the Five Civilized Tribes pursuant to the provisions of section 3 of the Act of April 12, 1926 (44 Stat. 239), shall be removed to a United States district court except upon the recommendation of the Secretary of the Interior or his duly authorized representative. The United States shall have the right to appeal from any order of remand entered in any case removed to a United States district court pursuant to the provisions of the Act of April 12, 1926 (44 Stat. 239).

Approved, August 4, 1947
61 Stat. 732

Oil and Gas Operating Regulations
30 C.F.R., Part 221

JURISDICTION AND FUNCTIONS OF SUPERVISOR

"§ 221.3. *Jurisdiction.* Drilling and producing operations, handling and gaging of oil and the measurement of gas or other products, determination of royalty liability, receipt and delivery to those entitled thereto of royalty accuring to the lessor and paid in amount of production, determination of amount and manner of payment of damages assessed under authority of the regulations in this part for defaults of non-compliance with duties by the lessee and, in general, all operations subject to the regulations in this part are

under the jurisdiction of the Supervisor for any district as delineated by the Director. As to producing leases of Indian lands, the officer in charge, and as to lands within naval petroleum reserves, the supervisor shall determine rental liability, record rentals, royalties, and other payments, and maintain these accounts. Upon request, the Supervisor or the Director will advise any person concerning the regulations in this part, and will furnish technical information and advice relative to oil and gas development and operation on lands subject hereto."

"§ 221.4. *General functions.* The supervisor is hereby authorized to require compliance with lease terms, with the regulations in this part, and all other applicable regulations, and with applicable law to the end that all operations shall conform to the best practice and shall be conducted in such manner so as to protect the deposits of the leased lands and result in the maximum ultimate recovery of oil, gas, or other products with minimum waste. Inasmuch as conditions in one area may vary widely from conditions in another area, the regulations in this part are general, and detailed procedure hereunder in any particular area is subject to the judgment and discretion of the supervisor, and to any areal plan of development that may be adopted pursuant to law. The supervisor may require satisfactory evidence that a lease is in good standing, that the lessee or operator is authorized to conduct operations, and that an acceptable bond has been filed before permitting operations on the leased land."

"§ 221.5. *Supervision of operations.* The supervisor shall inspect and supervise operations under the regulations in this part; prevent waste,

damage to formations or deposits containing oil, gas, or water or to coal measures or other mineral deposits, and injury to life or property; and shall issue instructions necessary, in his judgment, to accomplish these purposes."

"§ 221.14. *Suspension of operations and production.* On receipt of an application for suspension of operations or production or for relief from any drilling or producing requirement under a lease, the supervisor shall forward such application, with a report and recommendation, to the appropriate official and, pending action thereon, grant such temporary approval as he may deem warranted in the premises, or reject such application, subject to the right of appeal as provided in § 221.66."

"§ 221.66. *Appeals.* An appeal from any order issued under authority of the regulations in this part may be filed as hereinafter set forth in this section. Compliance with any such order shall not be suspended by reason of an appeal having been taken unless such suspension is authorized in writing by the Director, or the Secretary (dependent upon the officer with whom the appeal is pending), and then only upon a determination that such suspension will not be detrimental to the lessor or upon the submission and acceptance of a bond deemed adequate to indemnify the lessor from loss or damage."

APPENDIX "C"

THE SUPERIOR OIL COMPANY AND THE BRITISH-AMERICAN OIL PRODUCING COMPANY

IA-697

Decided March 8, 1957

Indian Lands: Leases and Permits: Oil and Gas

Where an Indian tribal oil and gas lease provides for a term of ten years and as much longer thereafter as oil and or gas is produced in paying quantities, upon failure of production after the primary period the lease terminates by its own terms.

Indian Lands: Leases and Permits: Oil and Gas—Oil and Gas Leases: Rentals

Neither the payment of advance rentals nor their receipt by Departmental officials upon a lease which had terminated can continue or reinstate the lease.

Indian Lands: Leases and Permits: Oil and Gas—Oil and Gas Leases: Suspension of Operations and Production

Under an Indian tribal oil and gas lease which provided as a condition to its existence that oil and gas be produced in paying quantities, upon a cessation of production no authority is vested in the Secretary of the Interior to allow a suspension of operations and thereby continue the term of the lease.

UNITED STATES
DEPARTMENT OF THE INTERIOR
Office of the Secretary
Washington 25, D. C.

IA-697 March 8, 1957

The Superior Oil Company and
The British-American Oil Producing Company

Oil and gas mining lease—1257-52

Appeal from a decision by the Commissioner of Indian Affairs that Wind River tribal lease I-96-Ind.6800 terminated for failure to produce in paying quantities.

Affirmed

APPEAL FROM THE COMMISSIONER OF INDIAN AFFAIRS

The Superior Oil Company and the British-American Oil Producing Company have, through their attorney, appealed from a decision by the Commissioner of Indian Affairs, dated December 19, 1955, which in effect affirmed a decision dated March 8, 1955, by the Area Director, Billings Area Office, Bureau of Indian Affairs, whereby the appellants were notified that an Indian tribal oil and gas mining lease held by them (I-96-Ind. 6806) had terminated because of a failure to produce oil and or gas in paying quantities.

The lease in question, made and entered into on

October 11, 1941, was approved by the Assistant Secretary of the Interior on January 3, 1942. The lease originally covered 280 acres[1] of Shoshone and Arapahoe tribal lands in Wyoming. The lease specified a term of "10 years from and after the approval hereof by the Secretary of the Interior and as much longer thereafter as oil and or gas is produced in paying quantities from said land", and for the payment, as royalty, of a percentage of the value or amount of oil and gas produced from the leased land. The primary term of the lease expired January 2, 1952. The record shows that a gas well was completed on the land held subject to the lease during the latter part of December, 1951. Copies of reports from the Regional Oil and Gas Supervisor, Geological Survey, are to the effect that the well in question produced gas through February, 1953[2] after which the well was "choked off by water" and no effort apparently was made thereafter to develop the land for mining purposes. Since the last period of production was during the year 1953, the advance acreage rentals paid by the appellants for the years 1954 and 1955 were ordered refunded to the appellants.

[1] After August 7, 1946 the lease was cancelled except as to 160 acres described as the NE¼, sec. 33, T. 3 N., R. 1 W.

[2] The following gas production by months was reported:

December	1951	801,000 c.f.	August	1952	817,000 c.f.
January	1952	2,117,000 "	September	1952	1,109,000 "
February	1952	2,148,000 "	October	1952	1,264,000 "
March	1952	1,618,000 "	November	1952	902,000 "
April	1952	1,123,000 "	December	1952	1,079,000 "
May	1952	1,136,000 "	January	1953	1,463,000 "
June	1952	888,000 "	February	1953	1,287,000 "
July	1952	1,007,000 "	March	1953	0 "

The appellants state that realizing the close proximity of the expiration date of the primary term, and appreciating the possibility of not being able to market the gas from the well in question and not knowing how permanent the production would be, an application was filed by them on December 26, 1951, for suspension of production and the continuance of the lease. While this application was submitted on the basis of the Departmental oil and gas operating regulations (30 CFR, Sec. 221.14), the Acting Director of the Geological Survey referred the matter to the Commissioner of Indian Affairs with the opinion that section 221.14 of the operating regulations did not constitute authority to waive the condition to the continuance of the lease beyond the primary term that oil or gas must be produced in paying quantities. The Commissioner of Indian Affairs concurred in this view in his decision of December 19, 1955.

The primary or fixed period of the above lease had expired. *Moreover, the only condition upon which that instrument might have been continued after the primary period was by the production of oil or gas in paying quantities, and unless such a condition of the lease is met the lease terminates, not by forfeiture, but by expiration of the period fixed by the contract of the*

§221.14 *Suspension of operations and production.* On receipt of an application for suspension of operations or production or for relief from the drilling or producing requirements under a lease, the supervisor shall forward such application with a report and recommendation to the appropriate official and, pending action thereon, grant such temporary approval as he may deem warranted in the premises or upon such application * * *

parties.[1] Thus, since the lease in question terminated when gas was no longer being produced in the year 1953, the advance acreage rentals which thereafter appear to have been paid for the years commencing January 3, 1954 and January 3, 1955 should be refunded. While a reference is made by the appellants to the payment of those rentals and their receipt by field officials of this Department, no effect can be imputed to such action as continuing the lease. In fact, the lease itself provides that such rentals are payable only during its continuance. Moreover, upon the termination of the lease, no further payments are due, neither could the making of such payments reinstate or continue a lease which had expired by virtue of its own terms.

There is no existing authority as a basis upon which the appellants' application for a suspension of operations could have been granted and the term of the lease extended. The appellants refer to the Assistant Secretary of the Interior's decision of March 23, 1955 (Robert E. Mead and Griffith Moore)[2] as reflecting the Secretary's power to grant relief in that respect. However, the action taken there was regarding an oil and gas lease issued under the provision of section 17 of the Mineral Leasing Act, as amended,[3] which

[1] *See Wilbur v. United States, ex rel. Ozark Oil & Refining Co.*, 54 F. 2d 437 (D.C. Cir. 1931); *Jewett v. Coffeyville Vitrified Brick & Tile Co.*, 122 Kan. 287, 251 P. 1110 (1927); 38 L.D. 12 (1942); Summers Oil & Gas, perm. ed., sec. 507.

[2] *See United States v. Brown*, 13 F. 2d 365 (N.D. Okla. 1926); *Haley v. Standard Oil & Gas Co.*, 228 F. 2d 298, 306 (C.A. 5th 1955).

[2] 62 I.D. 111.

[3] 30 U.S.C. (1952 ed.) sec. 226.

Act, of course, applies to public but not to Indian lands, such as those covered by the present lease. Moreover, a provision in the Mineral Leasing Act (sec. 39),[1] provides specifically for the suspension of operations and the extension of the term of leases issued under that Act. *The condition in the instant lease that it shall continue only for the primary period of ten years and as much longer thereafter as oil or gas is produced in paying quantities stems from a statutory limitation in that respect found in the Act of May 11, 1938.[2] In the face of such a Congressional direction, and in the absence of authority to waive or alter the condition under which the tribal lease was executed and approved, no officer of this Department was authorized to permit a suspension of operations under the tribal lease and thereby continue in force a lease which expired by reason of its own terms. Such administrative power must derive from Congressional authority which is not now apparent.* . . .

Accordingly, the decision of the Commissioner of Indian Affairs, dated December 29, 1955, is affirmed, and the appeal of the appellant oil companies is denied.

Hatfield Chilson
Assistant Secretary of the Interior

In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1960

No. 476

[redacted]

Petitioners,

VERSUS

[redacted] PETROLEUM COMPANY, a Delaware Corporation,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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In the

Supreme Court of the United States

OCTOBER TERM 1960

No. 476

W. A. MONCRIEF, JR., and JOE J. KLABZUBA,
Petitioners,

VERSUS,

PASOTEX PETROLEUM COMPANY, a Delaware Corporation,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

I

INTRODUCTION

This brief in opposition to the Petition for Certiorari lodged in this Court is submitted in accordance with the provisions of Rule 24. Petitioners will be referred to as such, as plaintiffs, or as Monerief, and the respondent as such, or as defendant, or as Pasotex. Parenthesis references, unless otherwise indicated, will be to the printed transcript filed in the United States Court of Appeals. Emphasis is supplied unless otherwise noted.

On May 13, 1948, *Rosa Drake McCann, a full-blood Chickasaw Indian*, executed an oil and gas lease [illegible] restricted lands allotted to her in the State of Oklahoma. Such lease for its validity was required to be ap-

proved and was approved by the Secretary of the Interior in accordance with the provisions of the Act of 1906, Section 20, 34 Stat. 137; as amended by the Act of 1908, Section 2, 35 Stat. 312, and subsequent amendments. (The pertinent provisions of those Acts appear in Appendices A and B.) Such lease was approved by the Secretary of the Interior on June 12, 1948, *and was for the "term of ten (10) years from and after the approval hereof by the Secretary of the Interior and as long thereafter as oil and or gas is produced in paying quantities from said lands."*

Rosa Drake McCann died on December 22, 1950, seized and possessed of such restricted allotted land. All of her heirs consisted of restricted Indians, and Mary Belle Cooper now Chadwick was such an heir. Restrictions were never removed from this land and on the 27th day of May, 1958, while the Departmental lease above referred to was admittedly in full force and effect and while drilling operations were in process, Mary Belle Cooper now Chadwick *executed an oil and gas lease to petitioners covering the interest in these same lands inherited by such restricted heir that was leased by the Departmental lease and from which restrictions had not been removed or Departmental supervision relinquished and which was under Departmental supervision.* This lease was executed pursuant to the provisions of the Act of 1947, 61 Stat. 732 (Appendix "C"), *which permits a full blood restricted Indian heir* to execute an oil and gas lease covering restricted inherited land with the approval of the County Court in the County in which the land lies; *the execution of a lease under this Act does not require any approval by the Secretary of the Interior and the lease is under no Departmental supervision.*

relief sought requests a remand to the Secretary of the Interior for administrative action and determination.

It is respondent's claim that this cause is one that presents a controversy arising under the laws of the United States. We feel that the claim of no federal question is refuted on the face of the petition itself and it is obvious the controversy in its ultimate outcome poses at most a simple question of title between petitioners and respondent and that this case presents no special and important question of state or federal law not heretofore determined or that should be determined by this Court.

II

QUESTIONS PRESENTED

Under Section III—"Questions Presented"—the questions asked in the petition are not in accord with respondent's understanding of the determinative issues, and it is desirable to clearly point out respondent's conception thereof with its contentions in brief.

As correctly stated by the Court of Appeals, the dispositive issue was:

> "Whether or not under undisputed facts the lessee of an oil and gas lease on restricted Oklahoma Indian land has complied with the lease requirements so as to extend the lease beyond its primary term."

That Court gave an affirmative answer and concluded that it was not necessary to consider when production was obtained or a well completed as the commencement of a

well as the primary term and subsequent productions extended the lease.

The District Court specifically found and determined that oil and gas in paying quantities was encountered in and produced from the Departmental lease prior to the expiration of its primary term and its conclusions show both the commencement and completion of a well producing oil or gas in paying quantities under the terms of the Departmental lease involved and its perpetuation by reason thereof (33, 34, 35). The basic issue asserted by petitioners *that respondent did not have a completed well capable of producing oil or gas in paying quantities at the expiration of the primary term*, we believe has been finally foreclosed in the courts below, both as to fact and as to law (33, 34, 35).

In posing the questions on which a review of this case is sought, petitioners present five questions. In order to avoid any confusion, they are set out immediately followed by our basic contentions with respect to each, viz:

"(1) Is the construction of a Departmental Oil and Gas Lease a 'question arising under the Constitution, laws and treaties of the United States'?"

Answer: As applied to the case at bar and the end sought to be accomplished by this litigation, this case is one of controversy arising under the Constitution, laws and treaties of the United States and federal jurisdiction exists and has been properly invoked.

"(2) If that question is answered in the affirmative, then is the Federal Court bound to construe the lease

by applying only the law of the State where the Court is sitting (as held below) or may the Court apply Federal law?"

Answer: This question is answered by Title 28, U.S.C., Section 1652, which reads:

> "The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply. June 25, 1948, c. 646, 62 Stat. 944."

The decision of the Court of Appeals is in strict accord with this statute and the decisions of this Court thereunder.

> "(3) If such a lease is to be construed under Federal law; does it expire in the absence of production at the end of the primary term even though drilling operations have been commenced?".

Answer: This question is beside the point, as the trial court found there was production at the end of the primary term (33, 34, 35), but if there had been no production at the end of the primary term, drilling operations commenced before the expiration of the primary term and then in progress would have continued the lease.

> "(4) Has the Congress delegated to the Secretary of Interior jurisdictional power to determine whether a Departmental Oil and Gas Lease has expired by its own terms?"

Answer: Congress itself has no such power and cannot delegate it.

"(5) If the preceding question is answered in the affirmative, then must the administrative remedy before the Secretary be exhausted before resort is had to a United States District Court?"

Answer: A Departmental oil and gas lease is essentially a contract between the lessor and the lessee. It is a contract that both parties are competent to enter into. The Secretary of the Interior is not a party thereto. Its validity depends, however, upon the approval of the Secretary of the Interior. His authority with respect to the lease after its approval is limited to the terms of the lease. The lease claimed by the petitioners is not a Departmental lease. It is in no way dependent for its validity on approval by the Secretary of the Interior. The Secretary of the Interior has no jurisdiction or supervision or authority over the same whatsoever. This controversy cannot be disposed of by administrative remedy, there being no administrative jurisdiction.

With the exception that the petitioners contended in the District Court and in the Court of Appeals that it was entitled to have production on the Departmental lease involved, consisting of a completed well thereon, with [illegible] equipment for production in tanks, and to have [illegible] to the expiration of the primary term of the lease, [illegible] production precedent to the extension of the primary term [illegible] which contention the lower courts resolved against petitioners on both the facts and law, none of the questions above posed were urged and designated by the petitioners as points relied on in the appeal to the Court of [illegible] (R. 20). Only after petitioners had submitted the case on a different theory of their own choosing on which the

Oklahoma decisions relied on by them were determined to be inapplicable and contrary to what they contended was the law in Oklahoma) and had lost were the other points now urged for the first time (either by petition for rehearing and or petition for certiorari) claimed as a basis for error in the proceedings in the lower courts.

III

STATEMENT OF THE CASE

The statement contained in Section V of the petition is insufficient on which to properly present respondent's position and is in many instances incorrect, and in amplification and in correction thereof, we make this additional statement.

The parties to this suit in the trial court consisted of the restricted heir and the petitioners who claimed under the lease executed by restricted heir, Mary Belle Cooper now Chadwick, and Pasotex Petroleum Company, the lessee, by assignment of the original allottee and the owner of the Departmental lease.

The petitioners filed this suit on August 18, 1958, in the United States District Court for the Eastern District of Oklahoma (2).

The land involved had been allotted to Rosa Drake McCann, a full-blood Choctaw Indian. Restrictions were never removed from said land and she died owning the same. During her life she executed the Departmental lease above referred to and it was approved by the Secretary of the Interior (29).

Departmental supervision has never been relinquished on this lease insofar as it covers the land here involved (30).

Rosa Drake McCann died on December 22, 1959, intestate. All of her heirs consisted of restricted Indians. Mary Belle Cooper now Chadwick was a restricted heir of the allottee and restrictions have never been removed on her interest in this land. Her interest in this land and the Departmental lease is subject to and under Departmental supervision (30).

On the 27th day of May, 1958, while the Departmental lease above referred to was admittedly in full force and effect as to her interest in the restricted land, Mary Belle Cooper now Chadwick sold, through the County Court of Love County, Oklahoma, and thereafter executed an oil and gas lease to petitioners covering the same lands that were covered in the Departmental lease and owned by such restricted heir and from which restrictions have not been removed or any Departmental supervision relinquished (30).

By the institution of this suit petitioners sought to have the lease executed by the restricted heir claimed by them determinated to be superior to the Departmental lease executed by Rosa Drake McCann, the original allottee and to have the title thereto quieted against the rights of Pasotex under the Departmental oil and gas lease. *The lease executed by the full-blood heir under which petitioners assert title was not advertised for sale by nor did any authority exist in the Department of the Interior to author-*

ize or to put any limitations upon the execution of such lease. Such lease did not require Departmental approval nor was it subject to Departmental supervision (Appendix "C"). The statements in the opposition's petition (pages 6-7, 21-22) to the contrary, for example: "the Department had absolute discretion as to whether this new lease should have been advertised for bidding"—are incorrect and are contrary to the facts and the law. They ignore and overlook applicable law controlling the execution of that new lease.

The complaint on its face showed no diversity, but it did show a value of the amount in controversy, exceeding the amount of $10,000.00, exclusive of interest and costs, which was admitted in the pleadings of all parties.

Pasotex, realizing that the matter in controversy was in excess of $10,000.00 and arises under the laws or treaties of the United States, and counsel feeling that under the Rules of Federal Procedure it was incumbent upon it to assert a cross claim or counterclaim and ask for affirmative relief, and realizing that in order for a final judgment to be binding on all necessary or indispensable parties the restricted Indian, Mary Belle Cooper now Chadwick and, through her, the United States, should be brought in, filed before answer date, an application to make Mary Belle Cooper now Chadwick a party (31).

An order granting this motion and making such restricted Indian a party defendant in the action was entered on September 23, 1958 (21). Immediately after Mary Belle Cooper now Chadwick had been made a party defendant and on the 23rd day of September 1958, Pasotex filed its

answer to plaintiffs' complaint and its cross-claim against the plaintiffs and Mary Belle Cooper now Chadwick (18-19, incl.). A notice of the pendency of this suit was duly served on the Area Director, formerly Superintendent of the Five Civilized Tribes (21) pursuant to the Act of April 12, 1926 (44 Stat. 239) and Mary Belle Cooper now Chadwick was likewise personally served as ordered by the court (31, 32).

The answer and cross-claim of the defendant in detail alleges the allotment of the land involved, the death of the full-blood Indian, the restrictions on the land, the execution of the Departmental lease, the fact that restrictions have never been relinquished thereon, the validity thereof with a copy of the Departmental lease attached, and *all elements necessary to invoke federal jurisdiction independent of the petitioners' complaint*, and concludes with the prayer that plaintiffs' suit be dismissed and that defendant have judgment on its cross-claim sustaining the validity of the lease.

The United States did not elect to appear in the cause either for itself or for the restricted Indian, and no appearance was made by the restricted Indian. The case was tried to the court and its Findings of Fact (29-34, incl.), set out in detail the facts which support the federal jurisdiction, as well as the facts which were undisputed and on which it rendered its Conclusions of Law (34, 35, 36) to the effect that the Departmental lease was valid and subsisting and the lease asserted by petitioners was of no force and effect and should be cancelled as a cloud on respondent's title (4-19, incl.).

Judgment was rendered denying petitioners' claim and dismissing the complaint and granting judgment to respondent on the cross-complaint and adjudicating the judgment to be binding upon the United States (36-39, incl.). The trial court specifically found that as a result of operations commenced on said lease as authorized therein, oil and gas in paying quantities was actually produced from said lease prior to the expiration of the primary term and that the term of said lease had been extended by discovery and production of oil and gas in paying quantities (34, 35).

Petitioners appealed to the Court of Appeals and on that appeal directed their claims of error against and limited the same to error in the trial court's determination that the Departmental lease had been extended by the discovery and production of oil and gas as authorized by the lease. It was the claim of petitioners that under the terms of the Departmental lease here involved it was necessary that a well be completed on the land involved and permanently equipped and ready to actually produce through its permanent equipment oil and gas in paying quantities into the pipeline prior to the expiration of the primary term of the lease, that this had not been done and the lease had therefore expired by its terms.

The argument was advanced both in the trial court and in the Court of Appeals that the substantive law of Oklahoma called for this result although the words "complete" or "completion" of a well are not even mentioned in the Departmental lease. On appeal the judgment was affirmed and a petition for certiorari has been lodged by petitioners with the Clerk of this Court.

IV
ARGUMENT AND GROUNDS FOR NOT REVIEWING THIS CAUSE

1. The record conclusively shows existence of a federal question.

When Congress displaced the treaty provisions formerly existing with respect to the Choctaw and other members of the Five Civilized Tribes and provided for the allotment of their lands in severalty, certain restrictions against alienation were retained and the same have been carried forward up until this time in the Act of 1906 (34 Stat. 137), as amended and changed by the Act of 1908 (35 Stat. 312), and by the Act of April 12, 1926 (44 Stat. 239), and as further amended by the Act of August 4, 1947 (61 Stat. 731) and other acts not here material. See Appendix.

In all matters that relate to the alienation of restricted lands or lands of restricted members of such Indian tribes to whom patents in fee have been issued, the government has and continues to assert an interest as guardian and protector of such restricted Indians with respect to their restricted lands. See *Heckman* v. *U. S.*, 224 U.S. 413, 56 L. Ed. 820; *Tiger* v. *Western Investment Co.*, 221 U.S. 286, 55 L. Ed. 738; *Brader* v. *James*, 246 U.S. 88, 62 L. Ed. 591; *Sunderland* v. *U. S.*, 266 U.S. 226, 69 L. Ed. 25; *U. S.* v. *Hellard*, 322 U.S. 363, 88 L. Ed. 1326.

In *Lancaster* v. *Kathleen Oil Co.* (Okla. 1916), 241 U.S. 551, 60 L. Ed. 1161, the United States Supreme Court had under consideration the determination of whether the lessee of an oil and gas mining lease by the heirs of an Indian allottee was valid against a subsequent lease to the

defendant approved by the Secretary of the Interior under the Act of May 27, 1908, and that Court concluded that such controversy presented a federal question.

Again, in *Wellsville Oil Co.* v. *Miller*, 243 U.S. 6, 61 L. Ed. 559, the Supreme Court of the United States in a controversy involving the validity of a lease on an Indian allotment subject to the condition that it be approved by the Secretary of the Interior before becoming operative determined that the case was reviewable as concerning matters inherently federal.

Other cases in point are *Creek Indians Nat'l Council* v. *Sinclair-Prairie Oil Co.*, 142 F.2d 842, *certiorari denied*, 323 U.S. 781, 89 L. Ed. 624; *Jefferson* v. *Gypsy Oil Co.*, 27 F.2d 304; *Roubedeaux* v. *Quaker Oil and Gas Co.* (Okla.), 23 F.2d 277, *certiorari denied*, 276 U.S. 636, 72 L. Ed. 744. Also see *Brown* v. *Stufflebean*, 187 F.2d 347, Tenth Circuit.

Prior to the passage of the Act of April 12, 1926, above referred to, the status of the guardianship of the United States with respect to the restricted lands of members of the Five Civilized Tribes such as are here involved is well stated in an opinion rendered in 1944 where in *Town of Okemah* v. *The United States*, 140 F.2d 963, it is stated:

> "Members of the Five Civilized Tribes who own allotted lands restricted against alienation are under the guardianship of the United States; they are wards of the Nation so far as the alienation of such lands is concerned. During the continuation of such guardianship, it is the right and the duty of the United States to enforce the restrictions designed for the security of the Indians by all appropriate means. The national interest is not to be expressed in terms of property, or

to be limited to the assertion of rights incident to the ownership of a reversion or to the holding of a technical title in trust. It has a governmental interest in the enforcement of the restrictions. It is not essential that it should have a pecuniary interest. Where lands are held by members of the Five Civilized Tribes under patents in fee with restraints on alienation, a decree undertaking the alienation of the Indians' interest in the lands in a suit to which the United States is not a party has no binding effect and the United States may sue to cancel the decree and set aside the conveyance made pursuant thereto. The United States is an indispensable party to any action wherein the relief sought would impair its governmental function to protect the allotted lands against alienation."

That Act was calculated to bring about two main purposes. If a suit was pending in either the United States courts or in a state court which affected property rights of a restricted member of the Five Civilized Tribes, machinery was set up so that the United States and all interested parties might be concluded by one proceeding and the title involved stabilized. See *United States* v. *Rice*, 327 U.S. 742, 90 L. Ed. 982.

The Act of 1926 was not an act vesting any jurisdiction in the federal court but, rather, with respect to jurisdiction with which it was already vested, the purpose of the Act was to specify the procedure by which a final and conclusive judgment could be obtained; and so far as the state court was concerned the United States relinquished its exclusive jurisdiction to the extent specified in the statutes to actions meeting the requirements of the statutes that might be brought or pending in the state court.

When it is remembered that the focal issue in this controversy is: Which of two leases is valid—a Departmental oil and gas lease on restricted Indian lands of a restricted member of the Choctaw Nation, which lease is under Departmental supervision and over which such Departmental supervision has never been relinquished,—or a lease on the same lands over which the respondent has no supervision subsequently executed by a restricted Indian heir under County Court approval; and

When it is remembered that Title 28, U.S.C., Section 1331 (a) reads as follows:

> "The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States"; and

When it is remembered that the amount in controversy is in excess of $10,000.00, exclusive of interest and costs; and

When it is pointed out that the petitioners in their brief, wherein they request a review by this Court, finally assert that this cause should be referred back to the Secretary of the Interior to dispose of this controversy;

We believe that the only question presented with respect to federal jurisdiction is *whether the same has been in this case properly invoked?*

2. Defendant's cross-claim invoked federal jurisdiction.

Under the Federal Rules of Civil Procedure, Rule 8 provides the method of pleading claims for relief. Subsection (a) thereof states that a pleading which sets forth a claim for relief, *whether an original claim, counterclaim, cross-claim, or third party claim, shall contain a short and plain statement of the grounds upon which the court's jurisdiction depends unless the court already has jurisdiction*, and such claim needs no new grounds for jurisdiction to support it.

Rule 12(b) provides that every defense in law or fact to a claim for relief whether a claim, counterclaim, cross-claim, or third party claim, shall be asserted in a responsive pleading, and subsection (h) of that rule provides that a party waives all defenses and objections which he does not present either by motion or answer.

Rule 13 provides in effect that claims arising out of the same transaction or occurrence, that is, the subject matter of the opposing party's claim, *must be affirmatively pleaded or they are waived, and in addition thereto permissive counterclaims are authorized, and provisions made for the bringing in of additional parties.*

When the complaint in this case was filed, the defendant realized that although the complaint did not so disclose on its face, that the action posed a federal question; to repeat, that the matters in such litigation involved were the respective rights of the plaintiffs under an oil and gas lease executed pursuant to the provisions of the Act of August 4, 1947 (61 Stat. 732), as against the rights of the defendant under an oil and gas lease executed prior

thereto by the restricted allottee under the Act of 1906 (34 Stat. 137) as amended, and which lease was approved by the Secretary of the Interior and over which lease he asserted jurisdiction.

This defendant, desiring to obtain a valid judgment in this case that would finally and effectually determine the rights of all parties, including the restricted Indian and the United States, immediately filed a motion to have Mary Belle Cooper now Chadwick made a party defendant herein. The court found that she was a necessary party and entered an order making her a party defendant. The opposing counsel made no objection to this procedure. The defendant then immediately filed its answer and cross-claim against the plaintiffs and against the restricted Indian defendant and notice was served on the United States as required by the Act of 1926. The answer and cross-claim of Pasotex in detail pleaded the facts which under the aforecited authorities show the jurisdiction and authority of the United States District Court, for the Eastern District of Oklahoma to entertain the suit and it asked for affirmative relief.

It is submitted that under these circumstances the United States District Court obtained jurisdiction over this controversy on *the basis of the cross-claim of Pasotex irrespective of whether or not plaintiffs' complaint disclosed or contained allegations sufficient to confer jurisdiction upon the court to begin with and irrespective of what happened to plaintiffs' case.*

In the case of *Manufacturers' Casualty Company v. Arapaho Drilling Co.*, 267 F.2d 5, the Tenth Circuit had the converse of the situation here before the Court under

consideration and in approving the rule that if the counterclaim asserts (independent of the main claim) grounds upon which federal jurisdiction can be sustained, used the following language:

> "In support of its contention that the trial court erred in not allowing a determination of the issues presented by the counterclaim, the appellant points out that plaintiff Campbell had no interest in the outcome of those issues; that, after dismissal of plaintiff Campbell's action diversity jurisdiction existed independently in the counterclaim; and that declaratory relief may be granted by way of counterclaim. And indeed it seems well settled that where a jurisdictional basis exists for a counterclaim it may sometimes be considered though the complaint fail for want of jurisdiction. Such was the background in *Isenberg* v. *Biddle*, 75 U.S. App. D.C. 100, 125 F.2d 741, 743, where summary judgment was granted on the counterclaim although the complaint was dismissed for 'want of jurisdiction,' and the Court of Appeals affirmed, stating:
>
> > "* * * Counsel insists that when the bill of complaint was dismissed, "the keystone of the District Court's jurisdiction fell and the counterclaim should have been dismissed with the bill." *Moore* v. *New York Cotton Exch.*, 270 U.S. 593, 607-609, 46 S.Ct. 367, 70 L.Ed. 750, 45 A.L.R. 1370, and *Kelleam et al.* v. *Maryland Casualty Co.*, 312 U.S. 377, 61 S.Ct. 595, 85 L.Ed. 899 are cited to sustain this position. In the last-named case, Justice Douglas, speaking to the facts in that case, said that once the bill of complaint was dismissed no jurisdiction remained for any grant of relief under the cross petition. But in that case there was no jurisdictional basis for the counterclaim independent of the main action. In the *Moore* case, the

dismissal of the main bill was not for want of jurisdiction; and the court refused to dismiss the counterclaim. Though it is suggested by Professor Shulman that it is implicit in the case that, if a plaintiff's action is dismissed for want of jurisdiction, the counter-claim falls, he adds that this is so only if there is no independent jurisdictional basis for the counter-claim. 45 Yale L.J. 393, 413. Here there is such independent basis and the rule is that in such circumstances, when the counterclaim seeks affirmative relief, it is sustainable without regard to what happens to the original complaint. *Lion Mfg. Corporation* v. *Chicago Flexible Shaft Co.*, 7 Cir., 106 F.2d 930, 933; *Vidal* v. *South American Securities Co.*, 2 Cir., 276 F. 855, 874; *Jackson* v. *Simmons*, 7 Cir., 98 F. 768 * * *."

"And in the case of *Switzer Brothers, Inc.* v. *Chicago Cardboard Co.*, 7 Cir., 252 F.2d 407, 410, the rule is thus formalized:

> 'It appears to be settled that where a counterclaim states a cause of action seeking affirmative relief independent of that stated in the complaint the dismissal of the complaint does not preclude a trial and determination of the issues presented by the counterclaim.'

"(4) But it is apparent in those exceptional cases where a counterclaim may survive the jurisdictional failure of a complaint that at least three premises must exist. Jurisdiction must exist within the scope of the allegations of the counterclaim; the claim made in the counterclaim must be independent of that made in the main case; and, lastly, affirmative relief must be sought. We are convinced the instant counterclaim falls far short of meeting these requirements."

Also, see *Isenberg* v. *Biddle*, 125 F.2d 744; *Piochi Mines, etc.* v. *Fidelity Philadelphia, etc.*, 206 F.2d 836; *Doby* v. *Doby*, 232 F.2d 504; *Montgomery Ward* v. *Collins*, 268 F.2d 830.

The cases relied on by petitioners are in the main diversity cases and their inapplicability to a situation such as here present are in cited cases clearly pointed out. *If the counterclaim independent of the petition presents a case of federal jurisdiction, jurisdiction has been properly invoked.*

3. The conclusion that the departmental lease had been extended is in accord with applicable law both federal and local.

Under numerical paragraphs 3, 4 and 6 of Section VI of the petition, petitioners argue that the laws of Oklahoma must give way to federal law in its determination of the issues involved. Under the provisions of Title 28, U.S.C. 1652, the laws of the State of Oklahoma and the decisions of its court, except where the Constitution or treaties of the United States or acts of Congress otherwise require or provide, are made the rules or decisions in civil actions in the courts of the United States in cases where they apply.

There is no principle better established and more uniformly adhered to by this Court than that the courts of the United States in deciding on titles to real property in the different states are bound to decide precisely as the state courts ought to do *where the Constitution, treaties or statutes of the United States do not otherwise provide.* See *Hyde* v. *Vattier*, 5 Peters 398, 8 L. Ed. 168.

"It is well settled that a conveyance by the United States of land which it owns beneficially or, as in this case, for the purpose of exercising its guardianship over Indians, is to be construed, in the absence of any contrary indication of intention, according to the law of the State where the land lies." *United States* v. *Oklahoma Gas & Electric Co.*, 318 U.S. 206, 87 L. Ed. 716. Also see *Grand Rapids & I.R. Co.* v. *Butler*, 159 U.S. 87, 40 L. Ed. 85, 15 Sup. Ct. 991; *Whitaker* v. *McBride*, 197 U.S. 510, 49 L. Ed. 875, 25 Sup. Ct. 530; *Oklahoma* v. *Texas*, 258 U.S. 574, 595, 596, 66 L. Ed. 771, 780, 781, 42 Sup. Ct. 406; see *Brewer-Elliott Oil & Gas Co.* v. *United States*, 260 U.S. 77, 88, 89, 67 L. Ed. 140, 146, 147, 43 Sup. Ct. 60; *United States* v. *Oregon*, 295 U.S. 1, 28, 29, 79 L. Ed. 1267, 1281, 55 Sup. Ct. 610; cf. *Jackson County* v. *United States*, 308 U.S. 343, 84 L. Ed. 313, 60 Sup. Ct. 285.

The Departmental oil and gas lease here involved in words provided that it should be in effect for a term of ten years and as long thereafter as oil or gas is produced from the lands involved. It had no provision inserted therein as to what was meant by oil and gas in paying quantities. It had no provision therein that required the completion of a well prior to the expiration of the primary term. *It had no provision that it would terminate if a well was not completed prior to the expiration of the primary term.* It did provide that the lessee might commence such wells during the term of the lease as lessee might see fit to commence, and under Oklahoma law, such lease was a commencement lease and not a completion lease (*State of Okla. ex rel Commissioners* v. *Carter*, 336 P.2d 1086) and if drilling were commenced during the primary term

the lease was perpetuated for as long as those operations were carried on and if they resulted in production, as long as oil or gas was thereafter produced (*Simons* v. *McDaniel*, 7 P.2d 419).

In the trial court and in the Court of Appeals, petitioners relied on the applicability of the Oklahoma law to the situation here involved. The opinion of the Court of Appeals in this case shows that it was properly applied and there is no rule, regulation or federal statute providing or specifying otherwise which prevents the substantive law of Oklahoma from being applicable to and controlling in the controversy here involved on the question of whether or not the lease herein was perpetuated in accordance with its terms and conditions.

This rule has been heretofore applied with respect to Departmental oil and gas leases on restricted lands and subject to Departmental supervision. *Magnolia Petroleum Company* v. *Wilson*, 215 F.2d 317, and *Sadler, et al.* v. *Public National Bank*, 172 F.2d 870.

In *Sperry Oil and Gas Company* v. *Chisholm*, 264 U.S. 488, 68 Law Ed. 803, there was involved a situation where a restricted Indian ratified an oil and gas lease covering restricted lands and other lands from which restrictions had been removed. The lands constituted his homestead under Oklahoma law. Under the Oklahoma law the signature of his wife was required to effectively lease the homestead. She did not execute. The federal law did not call for her signature as to restricted lands. This Court determined that the ratification was valid as to the restricted lands and invalid as to the lands on which restrictions had been removed.

4. The opinion decides no new questions and has no public importance or significance.

The authorities hereinbefore noted sustain the conclusion that the opinion here has decided no new questions of state or federal law and petitioners' argument of the importance of the opinion in the claim that it will adversely affect hundreds of existing oil and gas leases not only in Oklahoma but in other states as well covering thousands of acres under lease and will cause an identical lease in Kansas to be construed in a different manner from the same lease in New Mexico, Montana, Ohio or Texas, is unsound and without substance.

When attention is directed to the point that the petitioners have given no consideration whatsoever to *the fact that there could be no oil and gas lease on a Choctaw Indian's restricted land located in Kansas and, therefore, subject to Kansas law, or located in Texas and, therefore, subject to Texas law, or located in New Mexico and subject to New Mexico law, or located in Montana and subject to Montana law, or located in Ohio and subject to Ohio law, because the only restricted lands of these members of the Five Civilized Tribes are in Oklahoma*, the argument is without basis.

It is further to be noted that the particular form of lease which is specified to be used in the leasing of restricted lands of members of the Five Civilized Tribes is set out in Title 25 C.F.R., 174.1, *et seq., and it is noted, that these leases and regulations apply only to and are limited to members of the Five Civilized Tribes in Oklahoma.* And in the same volume of that code many various types of oil and gas leases and regulations prescribed with

respect to the leasing of the lands of other Indians and or tribes are set out and separate rules and regulations with respect thereto appear in said Title 25 C.F.R., as follows: (a) 171.1 *et seq.*—certain allotted lands of other Indians as therein specified; (b) 172.1 *et seq.*—reservation lands of the Crow Indians; (c) 173.1 *et seq.*—Osage Reservation lands in Oklahoma; (d) 175.1 *et seq.*—Quapaws; and others not necessary to note. Each set of these regulations with respect to leasing requirements is specific as to the particular tribe or Indians involved and no two of them are identical. And so far as government lands are concerned, they are handled under entirely different setups.

If it had been intended that all government lands and all Indian lands over which the government exercised supervision were to be leased on the same terms this multitude of different leasing rules and regulations would not have been set up.

5. The acts culminating in the new lease were in no way subject to or under the jurisdiction, authority or control of the Secretary of the Interior.

This controversy cannot be disposed of by administrative action. Petitioners in concluding their argument state:

> "In this case, however, the Secretary first *exercised* his discretionary authority and approved an oil and gas lease to the Respondent covering lands under his supervision. Ten years later, he *again exercised* his discretion and permitted the Petitioners to purchase a new lease which included the *same* acreage previously covered by Respondent's lease. Under such circum-

stances, the regulations conferred upon the Secretary not only the jurisdiction, but the duty to dispose of this controversy, and this case should be dismissed and remanded to him for that purpose."

At page 21 of the petition, it is emphasized that the petitioners' lease "was obtained at a judicial sale as a result of action by the Department of Interior in permitting such lease to be advertised for competitive bidding." And it is stated, "It should be emphasized that the County Court of Love County, Oklahoma, who sold the lease to Petitioner Klabzuba, *was acting as a "federal agency" for the Department. Parker* v. *Richard*, 250 U.S. 235, 63 L. Ed. 954; *United States* v. *Gypsy Oil Company*, 10 F.2d 487, 492 (10th Cir. 1925). Such authority was conferred upon it directly by the Congress, Section 9, 61 Stat. 731. Moreover, the Department had *absolute discretion* as to whether this new lease should have been advertised for bidding."

The above statements with respect to the authority, discretion and acts of the Secretary of the Interior, *concerning the lease executed by the restricted heir and approved by the County Court and under which petitioners claim title, are incorrect.* Such statements ignore and overlook the fact that the leasing by a restricted Indian of his restricted, allotted land must be approved by the Secretary of the Interior and the resulting lease is a Departmental lease such as is owned by respondent (Appendix "B"). *An entirely different method of leasing and approval by an entirely different agency and the application of entirely different provisions of law apply for the leasing for oil and gas purposes of a restricted Indian heir's inherited, re-*

stricted lands. Such a lease must be approved by the County Court (See Appendix "C").

The Departmental lease here involved was executed pursuant to the provisions of the Act of 1906, as amended (Appendix "B"). The lease upon which the petitioners rely was executed by the restricted Indian heirs pursuant to the provisions of the Act of 1947 (See Appendix "C"). There were two agencies set up by Congress by these two Acts with respect to the leasing of restricted Indian lands. Each was independent of the other. The Departmental lease was executed and its validity was dependent upon the approval of the Secretary of the Interior and the Secretary of the Interior still recognizes that lease to be valid and subsisting and in accordance with its terms has supervision over operations thereunder. The other lease was executed by the restricted Indian heir of her own volition, but was subject to be sold at competitive bidding and its validity was dependent upon such a sale and approval through the County Court. The Department of Interior had no authority whatsoever with respect to the leasing of the land by the restricted Indian heir and has no jurisdiction or supervision over such lease. *Parker* v. *Richards*, *supra*, and *United States* v. *Gypsy Oil Company* point this out: No administrative agency is vested with jurisdiction to settle this controversy. Respondents' title could in no way be cleared and quieted against the claims of the petitioners except by litigation.

V

CONCLUSION

We feel that the record in this case conclusively shows that the decision of the Court of Appeals herein is not in conflict with the decision of any other Court of Appeals on the same matter; likewise, the decision in no way has decided an important state or federal question. Nor has any federal question been decided in a way in conflict with the applicable decisions of this Court. As heretofore pointed out, there are no special and important reasons why a review of the decision of the Court of Appeals should be had by this Court and when the matters reflected by this record are tested by the considerations prescribed by this Court governing review on *certiorari*, and for all of the foregoing reasons, the Petition for the Writ of Certiorari should be denied.

Respectfully submitted,

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November, 1960.

APPENDIX

APPENDIX "A"

Act of 1906

"§20. That after the approval of this Act all leases and rental contracts, except leases and rental contracts for not exceeding one year for agricultural purposes for lands other than homesteads, of full-blood allottees of the Choctaw, Chickasaw, Cherokee, Creek, and Seminole tribes shall be in writing and subject to approval by the Secretary of the Interior and shall be absolutely void and of no effect without such approval: Provided, That allotments of minors and incompetents may be rented or leased under order of the proper court: Provided further, That all leases entered into for a period of more than one year shall be recorded in conformity to the law applicable to recording instruments now in force in said Indian Territory." 34 Stat. 137.

APPENDIX "B"

Act of 1908

"§2. That all lands other than homesteads allotted to members of the Five Civilized Tribes from which restrictions have not been removed may be leased by the allottee if an adult, or by guardian or curator under order of the proper probate court if a minor or incompetent, for a period not to exceed five years, without the privilege of renewal: Provided, That leases of restricted lands for oil, gas or other mining purposes, leases of restricted homesteads for more than one year, and leases of restricted lands for periods of more than five years, may be made, with the approval of the Secretary of the Interior, under rules and

regulations provided by the Secretary of the Interior and not otherwise: And provided further, That the jurisdiction of the probate courts of the State of Oklahoma over lands of minors and incompetents shall be subject to the foregoing provisions, and the term minor or minors, as used in this Act, shall include all males under the age of twenty-one years and all females under the age of eighteen years." 35 Stat. 312.

APPENDIX "C"

Act of 1947

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That all restrictions upon all lands in Oklahoma belonging to members of the Five Civilized Tribes, whether acquired by allotment, inheritance, devise, gift, exchange, partition, or by purchase with restricted funds, of whatever degree of Indian blood, and whether enrolled or unenrolled, shall be, and are hereby, removed at and upon his or her death: Provided, (a) That except as provided in subdivision (b) of this section, no conveyance, including an oil and gas or mineral lease, of any interest in land acquired before or after the date of this Act by an Indian heir or devisee of one-half or more Indian blood, when such interest in land was restricted in the hands of the person from whom such Indian heir or devisee acquired same, shall be valid unless approved in open court by the county court of the county in Oklahoma in which the land is situated; (b) that petition for approval of conveyance shall be set for hearing not less than ten days from date of filing, and notice of hearing thereof, signed by the county judge, reciting the consideration offered and a description of the land shall be given by publication in at least one issue of a newspaper of general circulation in the

county where the land is located and written notice of such hearing shall be given to the probate attorney of the district in which the petition is filed at least ten days prior to the date on which the petition is to be heard. The grantor shall be present at said hearing and examined in open court before such conveyance shall be approved, unless the grantor and the probate attorney shall consent in writing that such hearing may be had and such conveyance approved in the absence of the grantor, and the court must be satisfied that the consideration has been paid in full. Proceedings for approval of conveyances by restricted heirs or devisees under this section shall not be removable to the Federal courts; (c) the evidence taken at the hearing shall be transcribed and filed of record in the case, the expense of which, including attorney fees and court costs, must be borne by the grantee. The court in its discretion, when deemed for the best interest of the Indian, may approve the conveyance conditionally, or may withhold approval; (d) that at said hearing competitive bidding may be had and a conveyance may be confirmed in the name of the person offering the highest bid therefor or when deemed necessary the court may set the petition for further hearing; (e) that the probate attorney shall have the right to appeal from any order approving conveyances to the district court of the county in which the proceedings are conducted within the time and in the manner provided by the laws of the State of Oklahoma in cases of appeal in probate matters generally, except that no appeal bond shall be required; * * *" 61 Stat. 732.

APPENDIX "D"

Act of 1926

Sec. 3. Any one or more of the parties to a suit in the United States courts in the State of Oklahoma or in the State courts of Oklahoma to which a restricted member of the Five Civilized Tribes in Oklahoma, or the restricted heirs or grantees of such Indian are parties, as plaintiff, defendant, or intervenor, and claiming or entitled to claim title to or an interest in lands allotted to a citizen of the Five Civilized Tribes or the proceeds, issues, rents, and profits derived from the same, may serve written notice of the pendency of such suit upon the Superintendent for the Five Civilized Tribes, and the United States may appear in said cause within twenty days thereafter, or within such extended time as the trial court in its discretion may permit, and after such appearance or the expiration of said twenty days or any extension thereof the proceedings and judgment in said cause shall bind the United States and the parties thereto to the same extent as though no Indian land or question were involved. Duplicate original of the notice shall be filed with the clerk of the court in which the action is pending and the notice shall be served on the Supreintendent for the Five Civilized Tribes or, in case of his absence from his principal office, upon one of his assistants, and shall be served within ten days after the general appearance in the case of the party who causes the notice to be issued. The notice shall be accompanied by a certified copy of all pleadings on file in the suit at the time of the filing of the duplicate original notice with the clerk and shall be signed by the party to the action or his or her counsel of record and shall be served by the United States marshal and due return of service made thereon, showing date of receipt and service of notice. If notice is not served within the time herein specified, or if re-

turn of service thereof be not made within the time allowed by law for the return of service of summons, alias notices may be given until service and return of notice is had and in no event shall the United States be bound unless written notice is had as herein specified: Provided, That within twenty days after the service of such notice on the Superintendent for the Five Civilized Tribes or within such extended time as the trial court in its discretion may permit the United States may be, and hereby is, given the right to remove any such suit pending in a State court to the United States district court by filing in such suit in the State court a petition for the removal of such suit into the said United States district court, to be held in the district where such suit is pending, together with the certified copy of the pleadings in such suit served on the Superintendent for the Five Civilized Tribes as hereinbefore provided. It shall then be the duty of the State court to accept such petition and proceed no further in said suit. The said copy shall be entered in the said district court of the United States within twenty days after the filing of the petition for removal and the defendants and intervenors in said suit shall within twenty days thereafter plea, answer, or demur to the declaration or complaint in said cause, and the cause shall then proceed in the same manner as if it had been originally commenced in said district court, and such court is hereby given jurisdiction to hear and determine said suit, and its judgment may be reviewed by certiorari, appeal, or writ of error in like manner as if the suit had been originally brought in said district court." 44 Stat. 239.

FILE COPY

JAMES R. BROWNING

No. 470

SUPREME COURT OF THE UNITED STATES

W. A. MONCRIEF, JR. AND JOE I. KLABZUBA,
Petitioners

v.

PASOTEX PETROLEUM COMPANY,
A Delaware Corporation, *Respondent*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITIONERS' REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

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No. 476

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1960

W. A. MONCRIEF, JR. AND JOE J. KUBZUBA,
Petitioners

v.

PASOTEX PETROLEUM COMPANY,
A Deleware Corporation, *Respondent*

On Petition for a Writ of Certiorari to The United States Court of Appeals for the Tenth Circuit

PETITIONERS' REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

TO THE HONORABLE THE SUPREME COURT OF THE UNITED STATES:

Pursuant to Rule 24(4) of the rules of this Court, Petitioners respectfully submit this Reply Brief to Respondent's Brief in Opposition to the Petition for Writ of Certiorari filed in the above-styled and numbered cause.

FEDERAL QUESTION JURISDICTION DID NOT VEST AS A RESULT OF RESPONDENT'S COUNTERCLAIM

The Respondent has abandoned its argument to the Courts below that the Act of 1926, 44 Stat. 239, conferred original jurisdiction in the District Court:

> "The Act of 1926 *was not an act vesting any jurisdiction in the Federal Court* but, rather, with respect to jurisdiction with which it was already vested, the purpose of the Act was to specify the procedure by which a final and conclusive judgment could be obtained." (Page 15 of Respondent's Brief in Opposition).

Furthermore, Respondent concedes that the complaint filed by the Petitioners did not state a cause of action arising "under the Constitution, laws or treaties of the United States." It rests jurisdictional investiture solely on its counterclaim (RCA 5-9, 59). Thus, the counterclaim must, in effect, be treated as an original complaint for purposes of testing the requirements for federal question jurisdiction. This Court has made it clear that such requirements are stringent and that access to the federal courts through federal question jurisdiction is narrow indeed.

In order for the counterclaim to state an independent jurisdictional basis, it must show, not only its origin in the laws of the United States, but that the disposition of the claim *could be resolved only by the construction of federal law*. The Court of Appeals did not consider the counterclaim as having presented such a question because it decided the case in accordance with the local law of Oklahoma. Likewise, the District Court retained jurisdiction, not because of the counterclaim, but by reason of the fact that the Indian was made a party defendant to the suit (RCA 34). The mere presence of the Indian as a party to the suit simply did not vest federal juris-

(Emphasis supplied throughout)

diction. (See Petition for Writ of Certiorari, pages 10-11).

There is no rule of law that has been more frequently expressed by this Court than the rule that Federal Courts are courts of limited jurisdiction. For that matter, *this Court has not hesitated, even on its own motion*, to deny its jurisdiction and that of all other courts of the United States where such jurisdiction does not affirmatively appear in the record. The Court's views in this regard were clearly stated in the case of *Mansfield, C. & L. M. Ry. Co. v. Swan*, 111 U.S. 379, 382; 28 L.Ed. 462, 464, as follows:

> "It is true that the plaintiffs below, against whose objection the error was committed, do not complain of being prejudiced by it, and it seems to be an anomaly and a hardship that the party at whose instance it was committed should be permitted to derive an advantage from it; but the rule, springing from the nature and limits of the judicial power of the United States, *is inflexible and without exception*, which requires this court, of its own motion, to deny its own jurisdiction, and, in the exercise of its appellate power, that of all other courts of the United States, in all cases where such jurisdiction does not affirmatively appear in the record on which, in the exercise of that power, it is called to act. *On every writ of error or appeal the first and fundamental question is that of jurisdiction, first, of this court, and then of the court from which the record comes. This question the court is bound to ask and answer for itself, even when not otherwise suggested, and without respect to the relation of the parties to it.*"

IF FEDERAL QUESTION JURISDICTION IS PRESENT, THE CASE SHOULD BE RESOLVED IN ACCORDANCE WITH FEDERAL LAW

On this question, Respondent simply should not be permitted to "have its cake and eat it too." On the one hand, it asks this Court to approve Federal jurisdiction by reason of a Federal question involving the construction of Federal law, and then on the other hand, insists that the State law of Oklahoma can be used to decide the Federal question presented. As authority for this contention, it refers the Court to Title 28, U.S.C., Section 1652, which provides as follows:

> "§ 1652. *State laws as rules of decision.* The laws of the several states, *except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide*, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply. June 25, 1948, c. 646, 62 Stat. 944."

This statute of course, is the new version of the *Rules of Decisions Act* which was a codification of this Court's opinion expressed in *Erie Railroad Company v. Tompkins*, 304 U.S. 64, 82 L.Ed. 1188. Its purpose, as is made clear by countless decisions of the Federal Courts, is to secure uniformity of decisions between State and Federal Courts where jurisdiction is *based on diversity of citizenship. King v. United Commercial Travelers*, 333 U.S. 153, 157; 92 L.Ed. 608, 611.

28 U.S.C., 1940 Ed., Section 725

The District Court concluded as a matter of law *that diversity of citizenship was absent* in this case (RCA 34). The Respondent admits that there *was no diversity* at page 10 of its brief to this Court.

The controlling issue involved here is the construction of the term clause of the Departmental Lease which is copied from a federal regulation (25 C.F.R. 174.5) which in turn had its genesis in an Act of Congress. If there is Federal jurisdiction in this case, it is because of a Federal question. If there is a Federal question in the case, it is because the problem before the Court concerns the construction of a Federal regulation. It ineluctably follows, therefore, that Federal law and not State law should control.

Respondent makes no effort to cite any authority to the Court on the question of which law applies. It merely says that the question involved is one of title and that the law of the state where the land lies governs. If this be true, we ask again—where is the Federal question that gave jurisdiction to the District Court in the first place?

THE SECRETARY OF INTERIOR HAS THE JURISDICTIONAL POWER TO DETERMINE THIS CONTROVERSY AND FEDERAL JURISDICTION IS LACKING IN THE ABSENCE OF SECRETARIAL ACTION

Respondent makes the assertion that Congress itself lacks the power to confer upon the Secretary of Interior the jurisdictional authority to determine whether or not the Departmental Lease has expired by its own terms. In answer, we simply refer the Court to the elaborate federal regulations covering such leases issued by the Department of Interior pursuant to Congressional action. Pertinent sections of the regulations are discussed in our Petition. Among other things, the Secretary has discretion over the sale of such leases; he has complete supervision over the operations conducted on them; he has power to cancel such leases and impose penalties against the lessees; and he has the power to expire the leases where the terms are not complied with. We appended to our Petition one of his decisions where he expired a Departmental Lease (on facts similar to this case) covering Wind River Tribal lands for failure of production in paying quantities.

After having stated that the Secretary of Interior lacks jurisdictional power over Departmental Oil and Gas Leases, the Respondent nevertheless (and with remarkable inconsistency) repeatedly urges that Secretarial supervision *has never been relinquished as to the Departmental Lease here involved*. For example,

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on page 3 of its brief to this Court, the following statement is made:

> "The Departmental lease executed by the restricted Indian allottee on restricted allotted lands during her lifetime and approved by the Secretary of Interior and *admittedly under federal supervision and from which federal restrictions have never been relinquished*; . . ."

At page 9 of its brief, Respondent says:

> "Departmental supervision *has never been relinquished on this lease* insofar as it covers the land here involved; . . ."

And again on the same page, Pasotex declares:

> "Her [referring to the Indian] interest in this land and the Departmental lease is *subject to and under Departmental supervision.*"

On page 16 of its brief, Respondent poses this question:

> "Which of [the] two leases is valid—a Departmental Oil and Gas Lease on restricted Indian lands of a restricted member of the Choctaw nation which lease *is under Departmental supervision and over which such Departmental supervision has never been relinquished*,—or a lease on the same lands over which the Respondent has no supervision subsequently executed by a restricted Indian heir under County Court approval; . . ."

Finally, on page 27 of its brief, Pasotex flatly declares:

> "The Departmental lease was executed and its

> validity *was dependent upon the approval of the Secretary of the Interior and the Secretary of the Interior still recognizes that lease to be valid and subsisting and in accordance with its terms has supervision over operations thereunder.*"

These statements generously support one of the points that Petitioners have been endeavoring to make. Simply stated, it is this: Under applicable federal regulations, issued pursuant to Congressional mandate, the Secretary has the power to decide this controversy. Assuming that it is a *discretionary* power and one which Petitioners could not force him to exercise, the situation in this case is that *he has acted* and *has exercised* his *discretionary power* in approving Respondent's Departmental Lease.

We do not wish to quibble with Respondent as to whether or not the Department of Interior actually approved the lease covering the same piece of ground under which Petitioners assert a claim of interest. In this connection, we merely observe that the Petitioners' lease was obtained at a judicial sale in the County Court of Love County, Oklahoma; *that said County Court was acting as an agency of the Department when it approved the lease;* that such lease was advertised for competitive bidding in the Marietta Monitor of Love County, Oklahoma, at the instigation and as a result of an action initiated by the Respondent and finally that a United States District Attorney appearing for the Government was present at the courthouse when the lease was executed in favor of Petitioners. What we do wish to emphasize to the Court, however, is that *Respondent's Departmental*

Lease was approved by the Secretary, and is, by Respondent's own insistance, still under Departmental supervision. Under these circumstances, we urge that the Secretary has the duty to determine whether or not such lease expired under its own terms and *that Federal jurisdiction does not vest in the District Court until the Secretary has made his finding.*

Respondent has categorically stated to this Court that the Secretary "still recognizes [its] lease to be valid and subsisting." If this be true, the Secretary has never made this position known to Petitioners. We urge the Court to remand this dispute to the Secretary for a decision and if he rules in the manner Respondent so confidently predicts, no possible harm can result to Respondent and the jurisdictional defects in this case will be removed. In any event, we beseech the Court to at least *invite* the Secretary's views on this important question. We earnestly believe that the Court is entitled to this information and that the Secretary should cheerfully furnish it upon the Court's request.

The Respondent urges that the judgment of the United States District Court *binds* the Secretary of the Interior because of the Act of 1926, which is cited in the Appendix to our Petition beginning at Page 30. Such an argument *assumes* that there was Federal jurisdiction in the District Court to begin with because if Federal jurisdiction is lacking, this Act would be rendered wholly inapplicable, and by Respondent's own admission (Respondent's Brief, Page 15), the Act has absolutely nothing to do with "vesting any jurisdiction in the Federal Court."

THE CASE IS IMPORTANT IN THE ADMINISTRATION OF DEPARTMENTAL OIL AND GAS LEASES ON PUBLIC AND INDIAN LANDS

Respondent says that the case is not important because lands owned by members of the Five Civilized Tribes are located only in Oklahoma and that the question of uniformity of decisions between Federal Courts is not involved. It also points out that there are many different types of oil and gas leases and regulations with respect to the leasing of public and other Indian lands. The point is, that the term clause of the Departmental Lease here involved, and the term clauses of leases involving public lands as well as leases on lands of Indian Tribes other than the Five Civilized Tribes, contain substantially the same language. We have set forth in the Appendix hereto (infra, pages 14 & 15) the term clauses of several of these leases. The language is taken from the applicable Federal regulations. The Court will at once observe the similarity between them.

Such regulations generally require that the lease be issued for a specified period of time and "as much longer thereafter as oil and or gas is produced in paying quantities." The Department of Interior has uniformily construed such leases to be completion leases that require a well to be completed capable of producing oil or gas in paying quantities prior to the expiration of the primary term. Therefore, the decision of the Court of Appeals in this case is *exactly opposite* from Departmental decisions and the decisions by other Federal Courts involving the construction

of almost identical lease language. There are hundreds of such leases covering thousands of acres of land located in many states.

UNDER BOTH FEDERAL AND STATE LAW THE DEPARTMENTAL LEASE EXPIRED AT THE EXPIRATION OF ITS PRIMARY TERM FOR LACK OF PRODUCTION IN PAYING QUANTITIES

The Respondent makes no effort to distinguish the decisions of the Department of Interior and the Federal Courts cited in our Petition to the effect that Federal leases, such as the Departmental Lease, have been consistently construed to be completion leases. Neither does it deny that the overwhelming weight of authority under State law is to the same effect. It contents itself on this point by saying that such cases are "beside the point." Pasotex repeatedly asserts that the District Court made a finding of fact that oil was actually produced in the Brannan well prior to the expiration of the primary term. What the Court really found was that the well *was physically incapable of production* until long after the primary term had expired. The Court said:

> "There was no drilling in the [Brannan] well subsequent to June 9, 1958, *and thereafter* the casing was set and said well equipped for production; *the first gas and gas condensate produced through the permanent equipment in the well affixed thereto for production purposes was on June 21, 1958.* Condensate was sold from such well, which was produced while the well was testing between June 21 and June 25, 1958,

inclusive, and the production was in paying quantities." (RCA 34).

Respondent further says at page 5 of its brief that the Court concluded as a matter of law that the well involved was not only commenced, but completed prior to the expiration of the primary term. In another place in its brief (page 22), Respondent said that the Departmental Lease *expressly* provided the Lessee had the right to "commence" such a well during the term of the lease. These statements are simply inaccurate and the Record so reflects. The Court of Appeals declared that the well was not completed until sometime after the primary term had expired, and the Departmental Lease itself does not even contain the word "commence" or "commencement."

Finally, at page 2 of its brief, Respondent says that the Departmental Lease was approved by the Secretary of the Interior on June 12, 1948, for a term of ten (10) years. The approval by the Secretary of Interior actually occurred on June 10, 1948 (RCA 18). Therefore, on June 9, 1958, the day upon which Petitioners urge that the Departmental Lease expired, Respondent had not produced a cubic foot of gas or a barrel of condensate from the Brannan well, and for that matter could not, because casing and producing equipment had not even been installed to render the well capable of production.

CONCLUSION

For the reasons stated, it is respectfully submitted that the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX

TITLE 25, CODE OF FEDERAL REGULATIONS

Part 171—Leasing of Tribal Lands for Mining.

"§ 171.10 *Term of leases.* Mining leases may be made for a specified term not to exceed ten years from the date of approval by the Secretary of the Interior, or his authorized representative, and as much longer as the substances specified in the lease are produced in paying quantities."

Part 172—Leasing of Allotted Lands for Mining.

"§ 172.12 *Term of leases.* Mining leases may be made for a specified term not to exceed ten years from the date of approval by the Secretary of the Interior, or his authorized representative, and as much longer as the substances specified in the lease are produced in paying quantities."

Part 174—Leasing of Restricted Lands of Members of the Five Civilized Tribes, Oklahoma, for Mining.

"§ 174.5 *Term of oil and gas leases.* Oil and gas mining leases which require the approval of the Secretary of the Interior may be made for periods of ten years from the date of approval of lease by the Secretary of the Interior and as much longer thereafter as oil and or gas is produced in paying quantities."

TITLE 43, CODE OF FEDERAL REGULATIONS

Part 192—Leasing of Public Lands for Oil and Gas

"§ 192.40 *Classes and terms.* All leases, except those issued as renewals of 20-year leases, will be issued for a primary term of five years and so long thereafter as oil or gas is produced in paying quantities."